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426-561—71——1

1 RELEVANT DOCKET ENTRIES IN THE PROCEEDING BELOW

CAUSE NO. CR68–0661

STATE OF INDIANA
vs.
THEON JACKSON

Comes now Noble R. Pearcy, Prosecuting Attorney, May 6, 1968, and files with the clerk of said Court, AFFIDAVIT FOR ROBBERY which Affidavit, reads in the words and figures as following:

In the Criminal Court of Marion County, 1968 Term
STATE OF INDIANA,
Marion County, ss:

THE STATE OF INDIANA
vs.
THEON JACKSON
Affidavit for ROBBERY

BE IT REMEMBERED, That on this day before me, NOBLE R. PEARCY Prosecuting Attorney of the Nineteenth Judicial Circuit, personally came HARRY C. DUNN who, being duly sworn, upon his oath says that THEON JACKSON on or about the 28th day of JULY, A.D. 1967, at and in the County of Marion in the State of Indiana did then and there unlawfully, feloniously, forcibly by violence and putting MILDRED FARLEY in fear, take from the person and possession of the said MILDRED FARLEY, a purse and its contents of the value of FOUR DOLLARS ($4.00), which property the said MILDRED FARLEY then and there lawfully held in her possession and was then and there the property of MILDRED FARLEY, then and there being contrary to the

form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

2 /s/ HARRY C. DUNN.

Subscribed and sworn to before me, this 6th day of MAY, A.D. 1968.

/s/ NOBLE R. PEARCY,
Prosecuting Attorney, Nineteenth Judicial Circuit.

/s/ DAVID A. JESTER,
Deputy Prosecuting Attorney, Nineteenth Judicial Circuit.

And afterwards towit: Wednesday May 15, 1968, of said Court, before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

Comes now the State by State by J. Huschman, deputy prosecutor defendant in person and by counsel Wm. Laswell, Defendant in person waives arraignment and pleads not guilty.

CR68–0661 THEON JACKSON ROBBERY

WILLIAM LASWELL.

(All Entries Hereafter Are Identical in Both Cause No. CR68–0661 and CR68–0663.)

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3 Cause No. CR68–0663

STATE OF INDIANA
vs.
THEON JACKSON

Comes now Noble R. Pearcy, Prosecuting Attorney, May 5, 1968 and files with the clerk of said court, AFFIDAVIT FOR ROBBERY which Affidavit, reads in the words and figures as following:

In the Criminal Court of Marion County 1968 Term

STATE OF INDIANA,
Marion County, ss:

THE STATE OF INDIANA
vs.
THEON JACKSON

Affidavit for ROBBERY

BE IT REMEMBERED, That, on this day before me, NOBLE R. PEARCY Prosecuting Attorney of the Nineteenth Judicial Cir-

cuit, personally came HARRY DUNN who, being duly sworn, upon his oath says that THEON JACKSON on or about the 22nd day of JULY, A.D. 1967, at and in the County of Marion in the State of Indiana, did then and there unlawfully, feloniously, forcibly by violence and putting FLORENCE LYONS in fear, take from the person and possession of the said FLORENCE LYONS, Money, then and there of the value of FIVE DOLLARS ($5.00), which property the said FLORENCE LYONS then and there lawfully held in her possession, and which said money was there the property of FLORENCE LYONS, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

4 /s/ HARRY C. DUNN.

Subscribed and sworn to before me, this 6th day of MAY, A.D. 1968.

/s/ NOBLE R. PEARCY,
Prosecuting Attorney, Nineteenth Judicial Circuit.

And afterwards towit Wednesday May 15, 1968, of said Court, before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

Comes now the State by J. *Juschman*, deputy prosecutor, defendant in person and by counsel Wm. T. Laswell. Defendant in person waives arraignment and pleads not guilty.

CR68–0663 THEON JACKSON ROBBERY
WILLIAM LASWELL.

(All Entries Hereafter Are Identical in Both Cause No. CR68–0661 and CR68–0663.)

An afterwards towit Friday September 13, 1968 being the September Term, 1968, of said Court, before the Honorable John T. Davis Judge thereof, the following further proceedings were had herein towit:

Defendant by counsel Philip Melangton files Motion for Appointment of an Interpretor:

Which reads as follows:

In the Marion Criminal Court, Division I, Cause Nos. CR68–0661, CR68–0663

STATE OF INDIANA,
County of Marion, ss:

5 STATE OF INDIANA
vs.
THEON JACKSON

MOTION FOR APPOINTMENT OF AN INTERPRETER

Comes now Philip R. Melangton, Jr., attorney for the defendant in the above captioned causes, and moves that this Court appoint an interpreter without cost to the defendant, and in support of said motion states as follows:

1. That he has recently been appointed public defender for this defendant in each of the above captioned cases although said cases have been on file since May 6, 1968.

2. That counsel has examined a transcript of evidence on a hearing held in this court on May 15, 1968, and it is apparent to counsel that the defendant is a deaf mute with very little education and is unable to understand, read or speak the English language.

3. Counsel has conferred with Sergeant Brenton of the Indianapolis Police Department who is familiar with the sign language used in deaf mute communication and has been advised by Sergeant Brenton of the latter's inability to communicate with the defendant because of the defendant's lack of education and knowledge of the standard sign language.

4. That counsel has also communicated with Rev. Myron Prok who testified in this cause at said hearing on May 15, 1968, and has been informed that Rev. Prok has had difficulty communicating with defendant because of defendant's lack of understanding of the sign language.

6 5. It has come to the attention of counsel that there are those employed by the State of Indiana at the State School for the Deaf in Indianapolis, Indiana, who are engaged in education and instruction of deaf mutes although counsel is unaware of the identity of these persons.

6. That defendant is without funds with which to employ either his own private counsel or an interpreter, and therefore, it is encumbent on the State of Indaina to provide such interpreter.

It is, therefore, requested that this Court enter an order requiring the State of Indiana, through the office of the prosecuting attorney for the 19th Judicial Circuit, to make inquiry and determine the existence of someone employed by the State of Indiana at the State School for the Deaf at Indianapolis,

Indiana, who can act as an interpreter in this case in order that the defendant be able to understand the nature of the charges and assist his attorney in his defense and that after such person is located, that this Court appoint such person as such interpreter.

/s/ Philip R. Melangton, Jr.
PHILIP R. MELANGTON, JR.,
Attorney for Defendant,
933 Indiana Building, Indianapolis, Indiana 46204.

and request that causes be set on Jury Docket; Which reads as follows:

7 In the Marion Criminal Court, Division I, Cause Nos. CR68–0661, CR68–0663

STATE OF INDIANA,
County of Marion, ss:

STATE OF INDIANA
vs.
THEON JACKSON

REQUEST THAT CAUSES BE SET ON JURY DOCKET

Comes now Philip R. Melangton, Jr., attorney for the defendant in the above captioned causes and states that the defendant is a deaf mute and is incapable of speaking or understanding the English language and has had very little education. That by reason thereof, the defendant cannot independently waive his Constitutional right to trial by jury and counsel would be derelict in his duty to execute such waiver in his behalf. Counsel has been unable to communicate with the defendant with respect to the question of jury waiver and has been unable to ascertain by contact with others who have been in communication with defendant whether or not the defendant understands right to trial by jury and the possibility of waiver thereof.

WHEREFORE, it is requested that the above captioned causes both be placed on jury docket for early trial.

/s/ Philip R. Melangton, Jr.
PHILIP R. MELANGTON, JR.,
Attorney for Defendant,
933 Indiana Building, Indianapolis, Indiana 46204.

And afterwards towit Wednesday October 23, 1968 being the October Term, 1968, before the Honorable John T. Davis

Judge thereof, the following further proceedings were had herein towit:

8 Defendant by counsel requests continuance: granted. Court being duly advised that defendant might lack Comprehension Sufficient to Understand the Nature of Charges against him and to Aid his counsel in his own defense. Court now appoints Dr. Nie and Dr. Schuster to examine the defendant as to same.

* * * * *

And afterwards towit Tuesday November 12, 1968, of said Court, before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

Drs. L. Nie and D. Schuster files their Joint report, which reads as follows:

Hon. JUDGE JOHN DAVIS,
Criminal Court I,
City County Building,
Indianapolis, Ind.

NOVEMBER 8, 1968.

DEAR JUDGE DAVIS: At your request and with the help of Mr. John Olsen from the deaf school we examined Mr. Theon Jackson age 27 in the Detention Ward of Marion County General Hospital. Our examinations and observations were the result of a joint examination and observation period with Mr. Olsen helping in the communication with sign language since Mr. Jackson does not hear and does not communicate except through sign language and some pantomime. Our examination was based on our observations of Mr. Jackson and on information given us by Mr. Olsen who had spent some hours with Mr. Jackson trying to learn of his capacities.

He has denied flatly any responsibility for the acts which he was charged, but he has only limited capacity for ap-

9 preciating or understanding such charges. On the basis of our observations we believe he has a moderately severe intellectual defect in addition to his communicating difficulties. In making change and handling simple mathematical problems Mr. Jackson shows marked limitations in ability. He apparently can write and recognize his own name but no more.

On the basis of our observation of Mr. Jackson it is our opinion that he is mentally defective and coupled with his severe hearing loss and communication loss that he can neither under-

stand the nature of the charge against him nor can he adequately participate in preparing his own defense.

Very truly yours,

/s/ Louis W. Nie, M.D.
LOUIS W. NIE, M.D.

/s/ Dwight Schuster, M.D.
DWIGHT SCHUSTER, M.D.

* * * * *

And afterwards towit Wednesday December 18, 1968, of said Court, before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

State by John Hirschman, deputy Prosecutor; defendant in person and by counsel Philip Melangton. Submitted to Court for Mental hearing.

Witnesses sworn. Hearing had. Defendant submits evidence and rests.

Court takes this matter under advisement. Set for finding December 26, 1968, at 2:00 P.M.

10 And afterwards towit Thursday December 26, 1968 being the December Term, 1968, of said Court, before the Honorable John T. Davis Judge thereof, the following further proceedings were had herein towit:

Come now the State of Indiana by John Hirschman, deputy prosecutor; defendant Theon Jackson in person and by counsel Philip Melangton. Court having heard said evidence, now finds defendant lacks comprehension sufficient to make his defense.

Court now orders the defendant Theon Jackson committed to the Indiana Division of Mental Health to be confined until such time the Division of Mental Health shall certify to *his* Court that the defendant is sane.

The Sheriff of Marion County is directed to execute the order of this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is, committed to the Indiana Division Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane.

The Sheriff of Marion County is directed to execute the order of this Court.

And afterwards towit Wednesday January 21, 1969, of said Court before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

Attorney Philip Melangton for defendant files Motion for New Trial, which reads as follows:

11 In the Marion Criminal Court, Division I, Cause Nos. CR68–0561, CR68–0663

STATE OF INDIANA,
County of Marion, ss:

THE STATE OF INDIANA
v.
THEON JACKSON

MOTION FOR NEW TRIAL

Comes now the defendant Theon Jackson and moves for a new trial on each of the above captioned cases for the reason that the decision of the Court is not sustained by sufficient evidence and is contrary to law.

/s/ Philip R. Melangton, Jr.
PHILIP R. MELANGTON, Jr.,
Attorney for Defendant.

MEMORANDUM

On December 26, 1968, the Court held in each of the above captioned cases that the defendant has not comprehension sufficient to understand the proceedings and make his defense. The Court then ordered the defendant committed to the Department of Mental Health to be confined by the Department in an appropriate psychiatric institution.

The evidence in the case upon which the Court based its decision consisted in part upon the testimony of Doctors Louis W. Nie and Dwight Schuster, each of whom are practicing psychiatrists. The doctors testified that the defendant due to a severe hearing and communication loss could not understand the nature of the charges or assist in his own defense. The doctors also testified that it was doubtful whether the defendant would ever be able to communicate due to a lack of

12 comprehension. There was no evidence that the defendant was insane.

Burns 9–1706a provides that when at any time before the trial of any criminal cause the Court has reasonable ground for

elieving the defendant to be insane he shall fix a time for earing and appoint two physicians to examine the defendant. f the Court finds that the defendant has not comprehension ufficient to understand the proceedings and make his defense, he trial shall be delayed or continued on the ground of the lleged insanity of the defendant. It is also provided that the Court upon a finding that the defendant has not comprehension sufficient to understand the proceedings and make his efense shall order the defendant committed to the Department of Mental Health to be confined by the Department in n appropriate psychiatric institution. The statute further provides that whenever the defendant shall *become sane* the Court hall be advised and an order shall be entered directing the return of the defendant or the Court may enter such order whenver he shall be sufficiently advised of the defendant's *restoration to sanity.*

The statute apparently equates lack of comprehension and sanity inasmuch as the lack of comprehension causes the efendant's confinement and becoming sane or being restored o sanity terminates his confinement and permits him to stand rial. Inasmuch as the evidence here is that the defendant is ot insane and his sanity cannot be restored, there is no provision for the release of the defendant from confinement by he Department of Mental Health at any time. The defendant ust, therefore be considered to have been committed to the epartment of Mental Health for confinement in a psychiatric stitution for the rest of his life. The defendant has not been convicted of any crime.

The Sixth Amendment of the Constitution of the United States as well as Article I, Section 13, of the onstitution of the State of Indiana provide that a defendant ust be confronted by witnesses and has a right to be informed the nature and cause of the accusation. One, such as the efendant, cannot be brought to trial in the face of these Constitutional guarantees.

To confine this defendant in a psychiatric institution for the st of his life constitutes a deprivation of other Constitutional feguards afforded by the Constitution of the United States well as the Constitution of the State of Indiana. To be confined for life violates the Eighth Amendment of the United ates Constitution as well as Article I, Section 16, of the Constitution of the State of Indiana prohibiting cruel and unusual

punishment. Excessiveness as well as the mode of punishment may be unconstitutionally cruel in both State and Federal courts. *Weems v. United States* (1910) 217 U.S. 349. The defendant is being punished for being sick. *Powell v. Texas* (1968) 392 U.S. 514. *Robinson v. California* (1962) 370 U.S. 660.

The Thirteenth Amendment to the Constitution of the United States prohibits involuntary servitude except as a punishment for crime whereof the parties shall have been duly convicted. Such is also contained in Article I, Section 37, of the Constitution of the State of Indiana. The defendant has not been convicted of any crime and his confinement is in violation of these rights.

Defendant's confinement is also in violation of the due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

14 The action of this Court in confining the defendant pursuant to Burns, Indiana Statutes 9–1706a is, therefore, unconstitutional and a new trial should be granted.

Respectfully submitted,

/s/ Philip R. Melangton, Jr.
PHILIP R. MELANGTON, Jr.,
Attorney for Defendant,
933 Indiana Building, Indianapolis, Indiana 46204.

And afterwards towit Monday May 12, 1969, of said Court, before the Honorable John T. Davis Judge Presiding, the following further proceedings were had herein towit:

* * * * *

Court . . . files Entry Nunc Pro Tunc, which reads as follows:

In the Criminal Court of Marion County, Division I, Cause Nos. CR68–0661, CR68–0663

STATE OF INDIANA,
County of Marion, ss:

STATE OF INDIANA
vs.
THEON JACKSON

ENTRY NUNC PRO TUNC

It now appearing to the Court that there is a discrepancy in the records of the above causes, in that the Docket Book record

of both causes shows that the motion for new trial heretofore filed by the Defendant was overruled by this Court and the presiding judge thereof on February 10, 1969, whereas the entry prepared for and entered in the order book shows that the said motion was overruled on February 7; 1969, the Court now herein orders and directs that the order book entry be corrected to show that said motion for new trial filed in both of said causes was overruled by this Court on February 10, 1969.

EXCERPTS FROM BILL OF EXCEPTIONS (REPORTER'S TRANSCRIPT OF THE PROCEEDINGS)

DWIGHT SCHUSTER, a witness called by the Court, first having been duly sworn by the Court, testified as follows, to-wit:

* * * * *

(R., p. 53, l. 8 to p. 55, l. 3)

Q. And what opinions, if any did you form as a result of your examination?

A. It is my opinion that Mr. Jackson is mentally defective, has severe hearing loss and communication loss so that he can neither understand the nature of the charges against him nor can he adequately participate in preparing his own defense.

Q. Could you explain to me a little bit about this mental defect?

A. In the process of trying to communicate with him through Mr. Olson, through sign languages, through drawings, through printed matter, through gestures, for example trying to see if he could make change, actually handling money, it seemed evident that his basic intelligence was very limited, that he had only the rudiments of intellectual abilities. I did feel that he was able to perhaps understand a little bit about what we were talking but not sufficiently that he was able to give any response which was of significance or which would enable us to have any awareness of what had happened, as to why he was in custody.

Q. Doctor, I take it from your testimony, that in your opinion that this defendant is what is known as a deaf mute, is that correct?

A. Yes, sir.

Q. And did you form any opinion as to whether he can read and write?

A. It was our opinion that the most he probably could do would be to perhaps write his name and to recognize his own name but nothing else. We couldn't get him to read anything nor to write anything.

Q. And he also appeared not to understand the deaf mute signs, is that correct?

A. Very limited number of the signs.

Q. Doctor, as a result of your examination, did you form an opinion as to whether or not the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense?

A. In my opinion he does not have sufficient comprehension to understand the nature of the charges or to make his defense.

Q. As far as a cure for that condition is concerned, a cure would consist of his learning the deaf mute sign language if he is capable of so doing, is that correct?

A. Yes, I question how much ability he has, how much more he can learn, therefore the prognosis appears rather dim.

17 * * * * *

CROSS EXAMINATION

By MR. HIRSCHMAN, Deputy Prosecuting Attorney:

(R., p. 55, l. 11 to p. 56, l. 7)

Q. Doctor, did you satisfy yourself that you really got through to the man inside so as to determine whether that person within the physical framework understood what you were trying to derive from him or was this a matter of just your being unable through Mr. Olson to get to that person inside this physical framework?

A. It was pretty much impossible to get through to him. There were a few remote things that he seemed to grasp what we were asking about but as far as feeling that we ever got through to him as to why we were there and what we were interested in, no, I don't think we ever did.

Q. Then, in other words, your opinion and your analysis and your conclusion were based on the total, the sum total of your interview and examination, in other words, re-determined, did it not, the inability to have an exchange of communication with this individual?

A. Yes, communication is a basic thing. I might add that another factor that entered into it was Mr. Olson's statement that he had spent much time with this man in attempting to develop this communication and was unable to.

* * * * *

CROSS EXAMINATION

By MR. MELANGTON, Attorney for Defendant:

18 (R., p. 57, l. 27 to p. 58, l. 13)

Q. Doctor, realizing that the word sane and insane, sanity and insanity aren't really words used in the field of Psychiatry, you do understand what the law contemplates in using those words?

A. Yes, sir.

Q. Do you feel that he is insane?

A. In strict sense, legal sense, as I understand it being insane and unable to comprehend the nature of the charges and to assist his attorney in his defense, I would say insane, yes.

Q. All right, would you say that his sanity could be restored after commitment to the State Department of Mental Health?

A. I doubt it, I don't believe so.

* * * * *

REDIRECT EXAMINATION

By THE COURT:

(R., p. 58, l. 21 to p. 59, l. 2)

Q. Doctor, just on one point here, getting back to this mental defect, would that be what is sometimes referred to in the law as feeblemindedness?

A. Yes, mental retardation.

Q. Were you able to form any conclusions perhaps as to mental aid?

A. I didn't think in terms of mental aid, actually thinking of it right now, you could almost say that this would be pre-school level.

* * * * *

19 LOUIS W. NIE, a witness called by the Court, first having been duly sworn by the Court, testified as follows, to-wit:

* * * * *

(R., p. 61, l. 18 to p. 62, l. 17)

Q. And as a result of that examination, Doctor, what opinion, if any, did you form?

A. Well, first of all, it was obvious that Mr. Jackson was deaf and that he could not communicate in the usual way. We

satisfied ourselves that he could write his name with some difficulty, probably nothing more. His capacity for, we were satisfied that he was not literate in any sense of the word, that he could not communicate by written form nor could he read. Some of the efforts to communicate with him, we asked him to draw some figures and his human figures were such as we call stick figures, they are line figures; they are rather simple in production, they are the sort of things that children do. The handling of change and making change revealed pretty definite and pretty severe limitations in this area, and then with Mr. Olson's experience I felt we were unquestionably dealing with a man who presented a moderately severe mental deficiency, coupled with the communication defect.

Q. Doctor, did you form an opinion as to whether or not this defendant had comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense?

A. My opinion is that he does not have that kind of comprehension.

* * * * *

20 (R., p. 63, ll. 1–8)

Q. I see. In other words, if I understand you correctly then, you think that even if this man were not a deaf mute, that he would still lack the necessary comprehension?

A. That is my impression, yes, sir.

Q. And I take it also from that that the problem is he is deaf?

A. Yes, sir.

CROSS EXAMINATION

By Mr. Hirschman, Deputy Prosecuting Attorney:

(R., p. 63, ll. 15–19)

Q. Doctor, in your opinion, does this defendant have an understanding so as to differentiate between right and wrong?

A. I think he probably knows in a general way the basic differences between right and wrong, yes.

* * * * *

Emma Jackson, called as a witness on behalf of the defendant, first having been duly sworn by the Court.

DIRECT EXAMINATION

By MR. MELANGTON, Attorney for Defendant:

(R., p. 65, l. 14 to p. 66, l. 20)

Q. Would you tell the Judge your name, please?
A. Emma Jackson.
Q. Are you Theon Jackson's mother?
21 A. Sure is.
Q. How old is Theon?
A. Twenty-seven (27).
Q. And where was he born?
A. Greenwood, Mississippi.
Q. Did Theon ever go to school?
A. No, never did, he been sick all his days, I would just say all his days.
Q. Was he born deaf?
A. Sure was.
Q. When did you find out he couldn't talk?
A. Oh he was something like a year old, a little better than a year old.
Q. He has never talked?
A. No.
Q. What kind of jobs has he done?
A. Well, he worked at, since he has been here, he worked at the Holiday Inn.
Q. What doing?
A. In the kitchen, helping in the kitchen is all I can tell you, and he worked in Mississippi with the building construction and that's all. He has never been to school.

* * * * *

Q. Can he write?
A. He can sort of print his name, he can't write too good. He learned that since he has been here going to school.

22 CROSS EXAMINATION

By MR. HIRSCHMAN, Deputy Prosecuting Attorney:

(R., p. 67, l. 4 to p. 69, l. 13)

Q. Mrs. Jackson, how long has Theon worn glasses?
A. About four years, I guess.

Q. And what is the nature of his eye condition, if you know?

A. Yes, Doctor, what's that doctor's name, said he had something like a—he's blind in one eye, I'll tell you that.

Q. He is?

A. Uh huh, he can't see out of one.

Q. Not at all?

A. Not at all, the other one he has something like, he called a name but it something like a cataract but it wasn't no cataract on it, but it is something like that.

* * * * *

Q. And you took him to an eye doctor?

A. No, the Deaf and Dumb School sent him.

Q. The Deaf and Dumb School here?

A. Yes, they sent him.

Q. How long did he go to the Deaf and Dumb School?

A. Well, Mrs. Johnson taught him. He went to Mrs. Johnson about, oh I think she has been teaching him a little over three years now.

23 Q. Out at the Deaf and Dumb School?

A. Well she comes to the house each time, she has come to my house and then I take him over to her house.

* * * * *

Q. How long did she teach him?

A. Oh, about three years, I guess.

Q. And when was the last time that she taught Theon?

A. Right here in May.

* * * * *

Q. And how come you stopped?

A. When he come down here, they locked him up and she couldn't teach him.

Q. In May?

A. Yes, that's right she was teaching him.

* * * * *

JOHN OLSON, a witness called on behalf of the Defendant, first having been duly sworn by the Court

DIRECT EXAMINATION

By MR. MELANGTON, Attorney for Defendant:

(R., p. 70, l. 1 to p. 74, l. 3)

Q. Would you state your name for the record, please, sir?

A. John Olson.

Q. And what is your occupation?

24 A. I am the supervising teacher of the High School Department of the School for the Deaf.

* * * * *

Q. Now, sir, have you had occasion to be with Theon Jackson here?

A. Yes, I met with him on four occasions about an hour and a half or two hours each time.

Q. Each of those four was with me?

A. Yes.

Q. And then one with the Psychiatrist?

A. That's correct. Five times.

Q. Would you explain to the Court what you have concluded, if anything, with respect to Mr. Jackson and his ability to understand the nature of these charges and to communicate with his attorney or interpreter and to assist in his own defense?

A. There is a nebulous understanding of the nature of the charges. As far as being able to prepare or contribute with the defense, nothing. The man has no concept of time which is one of the most severe factors; he has no concept of any why, when; he has a limited understanding of the concept of who.

Q. Would he even know what day this was or what month?

A. No.

Q. Or what year?

A. No.

* * * * *

25 Q. And did you reach a conclusion as to whether there was any faking?

A. Well, after ten hours as far as his inability, that everything has been said about his inability to communicate is absolutely correct. He is not faking, in fact I am not sure he is even capable of faking, that's an opinion.

Q. Have you tried to trick him or anything?

A. He is easily tricked.

Q. I mean tricked to reveal faking is what I was driving at?

A. Yes. The only way you can do it is on the most objective thing from the basis of things he knows. We did it with likes of food, this sort of thing, the very base things. We tried getting him in admitting some concepts of time like simple things of yesterday and tomorrow. He has no conception of them whatsoever. We tried to get him into revealing some dis-

honesty in his misunderstanding of simple things like money. I found no attempts of deceiving anything.

Q. What have you found with respect to his understanding of the difference between right and wrong?

A. On very gross things and that is the only way you can question him, no abstractions, of course, at all. He does know when something is right or wrong, such things as—well, we pantomined. We went through such things as beating some one up, taking their money. Yes, I think he knows these things are right or wrong.

Q. Were you present when a demonstration was done with Mrs. Price with respect to her purse?

26 A. Oh, yes, yes.

Q. Did you observe his reaction?

A. Oh, his reaction, we immediately charged him with a pantomine crime in a very objective form, a sign language you did it type thing and he shook his head vehemently.

Q. All right now, sir, the law provides that a person can have an interpreter, you between the defendant and me in other words, and between the defendant and the witnesses and the prosecutor in a Court. Would you be able to interpret so that Mr. Jackson through you could understand testimony at trial?

A. No, no.

Q. Could you interpret so that Mr. Jackson through you could understand what I was saying?

A. No.

Q. Or what the Prosecutor was saying?

A. No, I could not.

Q. Or what the Judge said?

A. No, I could not.

* * * * *

(R., p. 75, l. 24 to p. 76, l. 18)

Q. As an educator, sir, of the deaf, can you evaluate his level of mental comprehension?

A. On the level of his mental comprehension, some social interest—oh, let's just leave it at a level of comprehension, it is about a three or four year old deaf child.

27 * * * * *

Q. Do you know whether or not the Indiana State Department of Mental Health has any facilities which could,

after a length of time, aid Theon Jackson to understand the nature of these charges and assist in the defense?

A. To the best of my knowledge and the knowledge of the men in vocational rehabilitation with whom I work all the time, there isn't anything in the State of that nature.

* * * * *

(R., p. 77, ll. 19 to 23)

Q. And you do not feel that you could act as an interpreter so he could understand you?

A. No. I could not act as an interpreter for this man at the trial, no, I could not and I know of no one else who could.

* * * * *

STATEMENTS OF PRESIDING JUDGE, IN OPEN COURT, AT TIME OF FINDING AND ORDER OF COMMITMENT

(R., p. 86, l. 3 to p. 87, l. 7)

The COURT: You don't suggest that there is some other provision I could proceed under?

Mr. MELANGTON: I haven't been able to come up with any, Your Honor. It may be a problem for a higher Court to determine that is why I am making this record.

The COURT: This would constitute final judgment but would be appealable.

Mr. MELANGTON: Yes, Your Honor, I am aware of that.

28 The COURT: I suggest then that you do file a Motion for a new trial. At this time I find that the defendant does not have comprehension to understand the nature of the criminal action against him and the proceedings thereon and to make his defense. In accordance with Section 9–1706a I, therefore, commit the defendant to the Indiana Department of Mental Health to be confined by the Department in a appropriate phychiatric institution until such time as he shall be certified competent to stand trial. All right, that is all.

29 OPINION OF THE SUPREME COURT OF INDIANA. FEBRUARY 19, 1970

IN THE SUPREME COURT OF INDIANA

Appeal from the Marion Criminal Court, Division I, Nos. 569 S 110, 569 S 111

THEON JACKSON, APPELLANT

vs.

STATE OF INDIANA, APPELLEE

Hon. JOHN T. DAVIS, *Judge.*

ARTERBURN, J. Appellant was charged by affidavits with two counts of robbery. There was no trial on either charge of robbery. The only issue considered by the trial court was the mental capacity of the appellant to stand trial. A hearing on the issue resulted in the following order by the trial court:

30 IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane.

The evidence at the hearing, which was conducted to determine appellant's capacity to stand trial, consisted mostly of the testimony of two psychiatrists the trial court had appointed to examine the appellant. Their examination revealed that appellant was a deaf-mute with a moderately severe intellectual defect. Both psychiatrists were of the opinion that appellant could neither understand the nature of the charges against him nor adequately participate in preparing his own defense. Appellant was found to be illiterate, which, when combined with his deaf-mute condition, presented a major communication gap. Appellant's mental retardation, or feeblemindedness, as one of the experts termed it, was such that his ability to learn sign language, or to learn to read or write, or both, was doubtful. Further testimony revealed that if appellant were to gain sufficient

comprehension to stand trial it would be only as a result of developing a means of communication. But even then there was some doubt expressed as to whether appellant would be able to comprehend the charges.

The trial court, in ordering appellant's examination and confinement, acted pursuant to Burns' Ind. Stat. Ann. § 9-1706a (1969 Cum. Supp.) which reads as follows:

> Commitment before trial—Subsequent actions.—When at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two (2) competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing, other evidence may be introduced to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be de-
> 31 delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. *If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution.* Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon

trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity. [Acts 1951, ch. 238, § 2, p. 682, 1961, ch. 151, § 2, p. 329; 1963, ch. 91, § 1, p. 58; 1967, ch. 291, § 2, p. 946.] (Emphasis added.)

It is appellant's contention that the above quoted statute is inapplicable; that he was denied due process of law; that in view of the unlikelihood of his improvement, he was in effect given a "life sentence." Appellant further urges that his commitment should properly be to an institute for the feebleminded and not to an institute for the insane. In this regard appellant would have the appellee first dismiss all charges against the appellant and then make application for appellant's commitment to an institution for the feebleminded. Appellant makes specific reference to Muscatatuck State Hospital and Training Center which was established to provide care for the feebleminded. Burns' Ind. Stat. Ann. § 22–1801 et seq. It appears to us that appellant has failed to understand the statutory mechanisms set up by the legislature as they refer to the Department of Mental Health.

Burns' § 9–1706a, which we quoted above, requires the appellant be committed to "the department of mental health, to be confined by the department in an appropriate psychiatric institution." It is clear that it is the department's function to determine the appropriate facility for the appellant. The choice does not lie with the appellant. Thus, the appellant is to be confined in "an appropriate psychiatric institution." Ap-
32 pellant apparently equates the term "psychiatric institution" with the term "insane" and argues that appellant should not be committed to an institution for the insane. The statute is broader in scope than appellant would have us believe. First, an amendment made to § 9–1706a in 1967 is noteworthy. That amendment replaced the phrase "insane hospital" with the present "psychiatric hospital." That amendment also gave the department more flexibility in dealing with various mental problems by substituting the phrase "the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution" for the phrase "the court shall commit the defendant, whether male or female, to the division of maximum security of the Dr. Norman M. Beatty Memorial Hospital." These changes clearly indicate a broadening of the scope of

§ 9–1706a to meet such problems as the one herein presented by the appellant's condition. Further, a careful scrutinization of the statutes creating the Department of Mental Health and setting up the mechanism for its functioning clearly dispel appellant's narrow interpretation.

Burns' Ind. Stat. Ann. § 22–5009 (1969 Cum. Supp.) designates the institutions over which the commissioner of the Department of Mental Health is to have control. That statute reads in pertinent part as follows:

> The commissioner of mental health shall have administrative control of and responsibility for all the state-owned and operated *mental health institutions*, including, but not necessarily limited to, the following designated institutions:
>
> (1) Central State Hospital;
> (2) Fort Wayne State Hospital and Training Center;
> (3) Evansville State Hospital;
> (4) New Castle State Hospital;
> (5) Richmond State Hospital;
> (6) Larue D. Carter Memorial Hospital;
> (7) Logansport State Hospital;
> (8) *Muscatatuck State Hospital and Training Center;*
> (9) Madison State Hospital;
> (10) Dr. Norman M. Beatty Memorial Hospital; and
> (11) Northern Indiana Children's Hospital. [Emphasis added.]

It is clear from the above statute that Muscatatuck State Hospital and Training Center is a "mental health institution" and is within the control of the department of mental health. Burns' § 22–5003(9) defines a "mental health institution" as any state-owned and operated "psychiatric institution" under the control of the department of mental health. Thus, Muscatatuck State Hospital and Training Center is "an appropriate psychiatric institution" within the meaning of the statute (§ 9–1706a), pursuant to which appellant was committed.

From the foregoing it can be seen that the Department of Mental Health, pursuant to § 9–1706a, is to commit appellant to an appropriate institution; that the available scope of institutions, as set out in Burns' § 22–5009, includes the Muscatatuck State Hospital, the very institute to which appellant

aspires; and that the decision concerning the appropriate institution for the appellant is properly to be made by the department. There is nothing to prevent the Department of Mental Health from eventually committing appellant to the institution he now desires. The choice lies within the professional and expert opinion of the department. It is not for appellant to dictate.

Appellant's argument, that the statute in question is unconstitutional because it imprisons appellant possibly for life, must fail. The legislature under its police power may provide for the safety, health, and general welfare. This necessarily includes the confinement, care and treatment of the mentally defective, retarded or insane.

Morgan v. State (1913), 179 Ind. 300, 101 N.E. 6; Marx *v. State* (1957), 236 Ind. 455, 141 N.E.2d 126; *State ex rel. Mavity v. Tyndall* (1946), 224 Ind. 364, 74 N.E.2d 914, cert. denied, 333 U.S. 834, 68 S.Ct. 609, 92 L.Ed. 1118, rehearing denied, 333 U.S. 858, 68 S.Ct. 732, 92 L.Ed. 1138.

Judgment affirmed.

Hunter, C.J., and Givan, J., concur.
Jackson, J., concurs in result.
DeBruler, J., dissents with opinion.

DISSENTING OPINION

DEBRULER, J.: The appellant was charged by affidavit with two robberies, totalling $9.00. Appellant is a twenty-seven year old deaf-mute, blind in one eye, who has never been to any school and has only a rudimentary understanding of sign language. He can neither read nor write.

Two psychiatrists and a teacher from the State School for the Deaf interviewed appellant and testified at the hearing on his competence to stand trial. They all agreed that appellant could not comprehend the nature of the charges against him nor assist in his defense because he had a mental deficiency and also because he had almost no means of communication other than a few gestures and pantomimes. They also agreed that there was almost no chance that appellant ever could improve his understanding sufficiently to be tried, even if he could gain a means of communication. However, the interpreter from the School for the Deaf stated that he knew of no facilities in this State which could help this appellant. He also stated the School for the Deaf did not accept mentally retarded persons. Thus, in effect, the commitment of appellant until he can comprehend the nature of the charges against him and assist in his defense is a commitment for life.

Burns' Ind. Stat. Ann. § 9–1706(a) provides for the commitment to the Department of Mental Health of a criminal defendant who is incompetent to stand trial because he "has not comprehension to understand the proceedings and make his defense." This commitment is for the purpose of giving the psychiatrists a chance to determine what can be done to alleviate the defendant's mental condition so that he can be tried, and a reasonable opportunity to achieve that goal. When the defendant's "sanity" is restored the commitment comes to an end because the purpose of the commitment has been accomplished.

That this is the rationale of the statute can be seen from the statutory language which says:

> If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and

> to make his defense, *the trial shall not be delayed or continued* on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, *the trial shall be delayed or continued* on the ground of the alleged insanity of the defendant. . . . Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same *as if no delay or postponement* had occurred by reason of defendant's insanity. Acts 1951, ch. 238, § 2, as last amended by Acts 1967, ch. 291, § 2, Burns' § 9–1706 (a). (Emphasis added.)

The statute clearly contemplates a *delay* in the trial or a *postponement,* which implies that the commitment to the psychiatric institution is a temporary one.

When the defendant's condition is permanent, as in this case and he cannot be helped by any known psychiatric technique, then the defendant cannot be committed under this statute because the *purpose* of the commitment cannot be accomplished.

What then is the purpose of the confinement of this appellant whose condition is permanent. Punitive? Protection of society? Protection of the appellant? Confinement to serve any of these purposes based merely on a trial court finding that appellant "has not comprehension to understand the proceedings and make his defense" in my opinion would violate the due process clause of the 14th Amendment to the United States Constitution. Appellant has not been convicted of any crime, nor found to be dangerous to the community or himself. It has not been shown that he cannot continue to live in our society as he has for twenty-seven years. What conceivable basis is there for committing this appellant to a psychiatric institution for, what is in effect, life?

Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under Burns' § 9–1706(a), *supra,* would obviously be ended. Thus, the existence of *unproved criminal charges* operates to keep appellant confined in a state

institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution. For a case interpreting the federal statutes on this point see *U.S. v. Curry* (1969), 410 F.2d 1372.

A permanent or open ended commitment under Burns' § 9–1706(a) would also violate the equal protection clause of the 14th Amendment to the United States Constitution. In order to civilly commit a mentally deficient person the court would have to find that the person, because of a "psychiatric disorder," which includes mental deficiency requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others of the community in which such persons reside. Burn's § 22–1201(1) and (2). There has never been such a finding in this case and there is no rational basis for treating appellant differently than another person who is to be civilly committed. The existence of criminal charges against appellant is not a rational basis for such a discrimination. *Baxtrom v. Herold* (1966), 388 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; *U.S. ex. rel. Schuster v. Herold* (1969), 410 F.2d 1071.

The majority opinion, in effect, holds that this technique is within the State's police power to provide for the safety, health and general welfare. I strongly dissent. The majority opinion's summary disposition of this important federal question is not a correct resolution of this issue.

* * * * *

RULING ON PETITION FOR REHEARING (MAY 14, 1970)

Appellant's Petition for rehearing denied.

Jackson and DeBruler, JJ. Dissent.

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5703

THEON JACKSON, PETITIONER

v.

INDIANA

On petition for writ of Certiorari to the Supreme Court of the State of Indiana.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

MARCH 22, 1971.

U S GOVERNMENT PRINTING OFFICE: 1971

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RESPONSE NOT PRINTED

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AUG 11 1970
E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. [redacted]

THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Robert Hollowell, Jr.
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Frank E. Spencer
1444 Consolidated Building,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. _____,

THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner, Theon Jackson, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-captioned case on February 19, 1970, petition for rehearing thereafter denied on May 14, 1970.

OPINION BELOW

The trial court, The Marion Criminal Court, Division I, entered a judgment on December 26, 1968, printed herein at p. 1a

as Appendix A. The Supreme Court of Indiana rendered judgment affirming the trial court and entered an opinion on February 19, 1970, which is printed herein at 2a as Appendix B and is reported at 255 N.E. 2d 515, with dissenting opinion printed herein at p. 7a and is reported at 255 N.E. 2d 518.

Upon Petition for Rehearing duly filed the Supreme Court of Indiana entered an order denying the same as follows, without further opinion, to-wit:

> "Appellant's Petition for rehearing Denied. Jackson and DeBruler, JJ. Dissent."

on May 14, 1970.

JURISDICTION

The Supreme Court of Indiana entered its opinion affirm ng the Judgment of the trial court on February 19, 1970. A timely Petition For Rehearing was thereafter duly filed by Petitioner Theon Jackson on March 11, 1970, which petition for rehearing was

denied by the Supreme Court of Indiana, without opinion, on May 14, 1970. This Petition For Certiorari is filed within ninety (90) days of that denial.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

The federal questions raised in this appeal are:

1. Whether the Indiana Courts violated the dictates of the Eighth Amendment of the Constitution of the United States by ordering the confinement of the Petitioner, a feebleminded deaf mute, until he has "become sane" as a commitment under a criminal charge (two charges, with joint sanity hearing) as distinguished from a civil commitment, such confinement amounting to a life sentence resulting from the lodging of the criminal charge, without trial thereof, constituing cruel and unusual punishment.

2. Whether the Indiana Courts violated the dictates of the Fourteenth Amendment of the Constitution of the United States by applying a statute concerning the insane, ordering the confinement of the Petitioner, a feebleminded deaf mute, until he has "become sane", confining him for life solely because he has been charged with a crime(s) for which he has not and will not be tried, (and as to which charges there have not even been any judicial determinations made that the incidents occurred, in respect to probable cause), and which he was incapable of committing, as crimes.

CONSTITUTIONAL PROVISIONS INVOLVED

Eighth and Fourteenth Amendments of the Constitution of the United States of America, to-wit:

EIGHTH AMENDMENT:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

FOURTEENTH AMENDMENT:

All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also Article 1, Section 12, of the Constitution of the State of Indiana:

"All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

STATUTES INVOLVED

The judgment of the Indiana trial court, affirmed by the Supreme Court of Indiana, was based upon the following Indiana statute:

Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann., 1956 Repl., (1969 Supp.), Sec. 9-1706a:

"When at any time before the trial of any criminal cause ***the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and

shall appoint two (2) competent disinterested physicians wh shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing other evidence may be introduced to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution. Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity."

The applicable statutes for the commitment and discharge of feebleminded persons are as follows:

Acts of the General Assembly of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907:

"A reputable citizen of the county from which an application is to be made shall make an application *** setting forth information substantially as follows: ***the cause and duration of the feeble-minded condition *** together with a certificate of a reputable physician that the applicant is admissible under the rules of the board of trustees, that he or she is feeble-minded and is not insane ***."

Acts of the General Assembly of Indiana, 1919, Ch. 94, Sec. 18, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1814:

"Any person may be discharged from the colony at any time by the board of trustees (commissioner of mental health), provided only that no person shall be discharged from the said colony until, in the judgment of the superintendent, the mental and physical condition of the patient justifies it."

STATEMENT OF THE CASE

The Petitioner was charged in Indianapolis, Marion County, Indiana, with the criminal offense of robbery, in two (2) separate causes, by affidavits. The first charge, filed May 5, 1968, (R. 1, ll. 1-12), charged the Petitioner with having committed a robbery on July 22, 1967, (R. 2), and the second affidavit, filed May 6, 1968, (R. 1, ll. 1-12), charged the Petitioner with having committed a robbery on July 28, 1967. (R. 2) In each case the Petitioner waived arraignment and entered a plea of "not guilty", (R. p. 12, both Transcripts, ll. 4-6); and on September 13, 1968, the counsel for Petitioner, stating that he had been unable to communicate with the Petitioner with respect to the question of jury waiver, requested that the causes be set on the Jury docket. (R. 24,25 both Transcripts) Thereafter on October 23, 1968, the court made an entry and order in both cases,

stating that: (R. 26, both Transcripts, ll. 5-9)

> "Court being duly advised that defendant might lack Comprehension Sufficient to Understand the Nature of Charges against him and to Aid his counsel in his own defense. Court now appoints Dr. Nie and Dr. Schuster to examine the defendant as to same."

In the joint report of the appointed doctors filed Nov. 12, 1968, observing that Petitioner does not hear and does not communicate except through sign language and some pantomime, they further stated that Petitioner

> "***is mentally defective and coupled with his severe hearing loss and comunication loss that he can neither understand the nature of the charge against him nor can he adequately participate in preparing his own defense."

(R. 28, ll. 1-5, 29, both Transcripts)

On December 18, 1968, the trial court held a hearing in respect to Petitioner, as defendant in both said cases, (R. 32, ll. 1-9, both Transcripts), and on December 26, 1968, found that:

> "***defendant lacks comprehension sufficient to make his defense"

and entered the following order:

(R. 33, ll. 7-19, both Transcripts)

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane."

At the hearing Dr. Dwight Schuster testified that the Petitioner is a deaf mute, mentally defective, could only understand a very limited number of deaf mute signs, does not understand the nature of the charges against him and cannot comprehend sufficiently to make his defense. (R.52-54) As to a "cure" of Petitioner's condition, it would consist of his learning the deaf mute sign language if he is capable of so doing, but the Doctor stated that he questioned how much abaility the Petitioner has, and then stated that therefore the prognosis appears rather dim--that he didn't think he (and a Mr. Olson, a deaf mute interpreter) ever got through to the Petitioner-- that Petitioner is insane if that means unable to comprehend the nature

of the charges and to assist his attorney in his defense -- that he, the Doctor, does not believe his, the Petitioner's, "sanity" could be restored after commitment to the State Department of Mental Health -- and that the mental defect of the Petitioner is what is sometimes referred to in the law as feeblemindedness, mental retardation, the mental level of the Petitioner being a pre-school level. (R. 55-58)

The other appointed Doctor, Dr. Louis W. Nie, testified that even if the Petitioner were not a deaf mute, he would still lack the necessary comprehension, and that he, the Doctor, doubted that the basic intelligence of the Petitioner, even if he could develop communication, would enable him to communicate effectively and to participate in a knowing, understandable way in his defense. (R. 62,63)

The interpreter who worked with the Doctors, John Olson, a supervising teacher of the High School Department of the School

For The Deaf(Indiana), testified that the level of mental comprehension of the Petitioner is about a three (3) or four (4) year old deaf child -- that there isn't anything in the State of Indiana in the nature of facilities which could, after a length of time, aid the Petitioner to understand the nature of the charges and assist in the defense.

The counsel for Petitioner duly filed a motion for new trial in both cases, contending therein that the decision of the court is not sustained by sufficient evidence and is contrary to law, and pointing out that there was no evidence that the Petitioner was insane, that the evidence shows and establishes that his "sanity" cannot be restored, that he must, therefore, be considered as having been committed for the rest of his life, without conviction of any crime, in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. (R. 34-37,

both Transcripts). Following the overruling of the motion for new trial, (R. 43, ll. 13-15, both Transcripts), the transcript of the Record and assignment of errors was duly filed with the Clerk of the Supreme Court of Indiana, in which assignment of errors Petitioner, by counsel, contended that the trial court had erred in overruling the motion for new trial. (R. 1A, both Transcripts)

In Petitioner's brief, the Appellant's Brief, his counsel duly contended, with appropriate citations, that without mental capacity there is no criminal intent, that without criminal intent there is no crime, that the Petitioner, being incapable of understanding the nature of the charges brought against him and unable to "recover" his "sanity" has been sentenced to life imprisonment, in violation of Article 1, Section 12 of the Constitution of Indiana, and the Eighth and Fourteenth Amendments of the Constitution of the United States.

(Appellant's Brief, pp. 23-26)

The Supreme Court of Indiana, in its opinion set out hereinafter at p. 2a, Appendix B, held that the Petitioner had not been denied due process of law, did not mention Appellant's contention in respect to the Eighth Amendment of the Constitution of the United States, but did hold that as to the imprisonment for life, the legislature under its police power may provide for the safety, health, and general welfare, including the confinement, care and treatment of the mentally defective, retarded or insane.

The dissenting opinion of Justice DeBruler, set out hereinafter at p. 7a, points out that the Petitioner cannot be committed under the state statute in question because the purpose of the commitment, to provide for treatment and trial in the future, cannot be accomplished, that the confinement of Petitioner for life on the basis of the existence of criminal charges against him,

unproven, is in violation of the due process clause of the 14th Amendment to the United States Constitution, as well as the equal protection clause of that Amendment.

Petitioner duly reiterated the same contentions of violation of the Eighth and Fourteenth Amendments of the Constitution of the United States in his Petition For Rehearing duly filed following the decision of the Supreme Court of Indiana, which Petition For Rehearing was thereafter denied without opinion by the Supreme Court of Indiana.

ARGUMENT

I.

THE CONFINEMENT OF THE PETITIONER, A FEEBLEMINDED DEAF MUTE, UNTIL HE HAS "BECOME SANE" AS A COMMITMENT UNDER TWO CRIMINAL CHARGES, AS DISTINGUISHED FROM A CIVIL COMMITMENT, SUCH CONFINEMENT AMOUNTING TO A LIFE SENTENCE RESULTING FROM THE LODGING OF THE CRIMINAL CHARGES, WITHOUT TRIAL THEREOF, CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The uncontradicted evidence in the hearing held in the Marion Criminal Court, Division I, pursuant to the Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann. 1956 Repl., (1969 Supp.), Sec. 9-1706a, set out hereinabove at pp. 5,6 of this Petition, showed that:

1. The Petitioner is mentally defective, and cannot understand the nature of the charges against him. (R. 53, ll. 1-13)

2. The Petitioner, in addition to mental defect, is a deaf mute. (R. 54, ll. 3-6)

3. The Petitioner does not have sufficient comprehension to understand the nature of the charges or to make his defense. (R., 54, ll. 21-23)

4. If you equate insanity with being unable to comprehend the nature of the charges and to assist his attorney in his defense, Petitioner's sanity could not be "restored." (R. 57, ll. 27 to p. 58,

5. The mental defect is what is referred to in the law as feebleminded-ness, (R. 58, ll. 21-24), mental retard-ation.

6. Even if **Petitioner** were not a deaf mute, he would still lack the necessary comprehension. (R. 63, ll. 1-5)

7. Petitioner's mental comprehension is about that of a three or four year old deaf child, (R. 75, l. 24 to p. 76, l. 2), below 60 I.Q. (R. 76, l. 19 to p. 77, l. 3)

If **Petitioner** were committed to the institution designed for treatment and care of the feebleminded, under a civil commit-ment pursuant to the provisions of the Acts of the General Assembly of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907, set out hereinabove at p. 7 of this Petition, it would be upon certification by a repu-table physician that he is <u>not</u> insane; and he would be eligible for discharge

merely upon the determination of the superintendant that "the mental and physical condition of the(Petitioner) justifies it."

Acts of 1919, Ch. 94, Sec. 18, as found in Burns (1964 Repl.), Sec. 22-1814 (set out hereinabove at p. 7 of this Petition.)

But obviously the commitment in this case, "until he shall become sane", is for life.

Without mental capacity there is no criminal intent, and without criminal intent there is no crime,

Fritz v. State of Indiana (1912), 178 Ind. 463, 466, 99 N.E. 727

and it is not just a vague and general differentiation between right and wrong that indicates criminal responsibility, but rather specific knowledge and comprehension of the nature and consequences of the act with which the defendant is charged.

Flowers v. State of Indiana (1956), 236 Ind. 151, 163, 161, 139 N.E. 2d 185

It is that comprehension that the Petitioner, having a mental age of three or four, with almost an entire lack of communication with the society in which he lived, lacked. Being incapable of committing a crime, not having been convicted of any crime, being unable to understand the nature of the charges brought against him, and being unable to "recover" his "sanity", he has been sentenced for life imprisonment. Under such circumstances it is respectfully submitted that life imprisonment is punishment, cruel and unusual, in violation of the Eighth Amendment of the Constitution of the United States, supra, p.4.

Weems v. United States (1910),
217 U.S. 349

Powell v. Texas (1968)
392 U.S. 514

Robinson v. California (1962)
370 U.S. 660

II.

THE CONFINEMENT OF THE PETITIONER, A FEEBLEMINDED DEAF MUTE, UNTIL HE HAS "BECOME SANE" AS A COMMITMENT UNDER TWO CRIMINAL CHARGES, CONFINING HIM FOR LIFE SOLELY BECAUSE HE HAS BEEN CHARGED WITH TWO CRIMES, FOR WHICH HE HAS NOT AND WILL NOT BE TRIED (AND AS TO WHICH CHARGES THERE HAVE NOT EVEN BEEN ANY JUDICIAL DETERMINATION MADE THAT THE INCIDENTS OCCURRED, IN RESPECT TO PROBABLE CAUSE), AND WHICH HE WAS INCAPABLE OF COMMITTING, AS CRIMES, IS A VIOLATION BY THE STATE OF INDIANA OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Without repeating herein the uncontradicted evidence in the mental hearing in the trial Court, supra, pp. 16,17, we respectfully request herein that the same be noted under this point also.

The Petitioner, a man with the mental comprehension equal to that of a three or four hear old child, who is also a deaf mute, has, because of the existence of two pending criminal charges against him, been committed to confinement for life. He does not have, and can not in the future

have comprehension sufficient sufficient to make his defense to the criminal charges of robbery lodged against him. He is not insane, unless all feebleminded persons with a mental level of a three or four year old child are insane. In addition to his admitted mental deficiency he is deaf and unable to speak. It does not seem possible in this day and age, but this man without communication and with the brain of a small child has been sentenced to life imprisonment. As pointed out above at p. 18, he is incapable of committing a criminal act, as such, and if the State of Indiana did indeed commit him for treatment and care as a feebleminded person (with certification that he is not insane), he would be eligible for discharge merely upon the determination of the superintendant that

"the mental and physical condition of the (Petitioner) justifies it."

> Acts of 1919, Ch. 94, Sec. 18, as found in Burns (1964 Repl), Sec. 22-1814 (set out hereinabove at p. 7 of this Petition.)

It is respectfully submitted that as a matter of due process of law, under the Fourteenth Amendment of the Constitution of the United States, when it was established without contradiction that the Petitioner lacked comprehension, was feebleminded, had the mental capacity of a three or four year old deaf child, and was obviously therefore not criminally responsible for his acts, the State of Indiana should have been required to dismiss the criminal charges against the Petitioner, and commence proceedings for his commitment as a feebleminded patient to the appropriate State institution. There was at no time a judicial determin-

ation of probable cause, but it is obvious that no supportable determination of probable cause could have been made, since the Petitioner was incapable of committing a crime. There was simply no basis for the continuation of criminal charges against the Petitioner, any more than such charges could have been maintained against a defendant found to be only four years old. The commitment of Petitioner for life is neither fair nor just, and he has been deprived of due process and due course of law, and denied justice, to which he is entitled without denial, speedily, and without delay.

Fourteenth Amendment of the Constitution of the United States

Article 1, Sec. 12, Constitution of the State of Indiana

As stated by Justice DeBruler, in his dissenting opinion: (Appendix B, p. 8a herein, 255 N.E. 2d 518, 519)

> "Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under Burns Sec. 9-1706(a) supra, would obviously be ended. Thus, the existence of unproved criminal charges operates to keep appellant confined in a state institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution. For a case interpreting the federal statutes on this point see U.S. v. Curry (1969), 410 F. 2 1372.
>
> ***
>
> There is no rational basis for treating appellant differently than another person who is to be civilly committed. The existence of criminal charges against appellant is not a rational basis for such a discrimination. Buxstrom v. Herold (1966), 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620; U.S. ex rel. Schuster v. Herold (1969), 410 F. 2d 1071."

CONCLUSION

The Petitioner, by his undersigned counsel, respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana, and that the same should be held to be in violation of the Eighth and the Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

JUDGMENT ENTRY OF THE MARION CRIMINAL COURT, DIVISION I, STATE OF INDIANA, DEC. 26, 1968

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION CRIMINAL COURT, DIV. I
CAUSE Nos. CR68-0661
CR68-0663

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane."

APPENDIX B

OPINION OF THE SUPREME COURT OF INDIANA,
FEBRUARY 19, 1970

IN THE
SUPREME COURT OF INDIANA

Nos. 569 S 110
569 S 111

THEON JACKSON, Appellant, -vs- STATE OF INDIANA, Appellee.	Appeal from the Marion Criminal Court, Div. I Hon. John T. Davis, Judge

---

ARTERBURN, J.

Appellant was charged by affidavits with two counts of robbery. There was no trial on either charge of robbery. The only issue considered by the trial court was the mental capacity of the appellant to stand trial. A hearing on the issue resulted in the following order by the trial court:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane."

The evidence at the hearing, which was conducted to determine appellant's capacity to stand trial, consisted mostly of the testimony of two psychiatrists the trial court had appointed to examine the appellant. Their examination revealed that appellant was a deaf-mute with a moderately severe intellectual defect. Both psychiatrists were of the opinion that appellant could neither understand the nature of the charges against him nor adequately participate in preparing his own defense. Appellant was found to be illiterate, which, when combined with his deaf-mute condition, presented a major communication gap. Appellant's mental retardation, or feeblemindedness, as one of the experts termed it, was such that his ability to learn sign language, or to learn to read or write, or both, was doubtful. Further testimony revealed that if appellant were to gain sufficient comprehension to stand trial it would be only as a result of developing a means of communication. But even then there was some doubt expressed as to whether appellant would be able to comprehend the charges.

The trial court, in ordering appellant's examination and confinement, acted pursuant to Burns' Ind. Stat. Ann. § 9-1706a (1969 Cum. Supp.) which reads as follows:

"Commitment before trial—Subsequent actions.—When at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two (2) competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing, other evidence may be introduced to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged

insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. *If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution.* Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity. [Acts 1951, ch. 238, § 2, p. 682, 1961, ch. 151, § 2, p. 329; 1963, ch. 91, § 1, p. 58; 1967, ch. 291, § 2, p. 946.] (Emphasis added.)

It is appellant's contention that the above quoted statute is inapplicable; that he was denied due process of law; that in view of the unlikelihood of his improvement, he was in effect given a "life sentence." Appellant further urges that his commitment should properly be to an institute for the feebleminded and not to an institute for the insane. In this regard appellant would have the appellee first dismiss all charges against the appellant and then make application for appellant's commitment to an institution for the feebleminded. Appellant makes specific reference to Muscatatuck State Hospital and Training Center which was established to provide care for the feebleminded. Burns' Ind. Stat. Ann. § 22-1801 et seq. It appears to us that appellant has failed to understand the statutory mechanisms set up by the legislature as they refer to the Department of Mental Health.

Burns' § 9-1706a, which we quoted above, requires the appellant be committed to "the department of mental health, to be confined by the department in an appropriate psychiatric institution." It is clear that it is the department's function to determine the appropriate facility for the appellant. The choice does not lie with the appellant. Thus, the appellant is to be confined in "an appropriate psychiatric institution." Appellant

apparently equates the term "psychiatric institution" with the term "insane" and argues that appellant should not be committed to an institution for the insane. The statute is broader in scope than appellant would have us believe. First, an amendment made to § 9-1706a in 1967 is noteworthy. That amendment replaced the phrase "insane hospital" with the present "psychiatric hospital." That amendment also gave the department more flexibility in dealing with various mental problems by substituting the phrase "the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution" for the phrase "the court shall commit the defendant, whether male or female, to the division of maximum security of the Dr. Norman M. Beatty Memorial Hospital." These changes clearly indicate a broadening of the scope of § 9-1706a to meet such problems as the one herein presented by the appellant's condition. Further, a careful scrutinization of the statutes creating the Department of Mental Health and setting up the mechanism for its functioning clearly dispel appellant's narrow interpretation.

Burns' Ind. Stat. Ann. § 22-5009 (1969 Cum. Supp.) designates the institutions over which the commissioner of the Department of Mental Health is to have control. That statute reads in pertinent part as follows:

> "The commissioner of mental health shall have administrative control of and responsibility for all the state-owned and operated *mental health institutions*, including, but not necessarily limited to, the following designated institutions:
>
> (1) Central State Hospital;
>
> (2) Fort Wayne State Hospital and Training Center;
>
> (3) Evansville State Hospital;
>
> (4) New Castle State Hospital;
>
> (5) Richmond State Hospital;
>
> (6) Larue D. Carter Memorial Hospital;
>
> (7) Logansport State Hospital;
>
> (8) *Muscatatuck State Hospital and Training Center;*
>
> (9) Madison State Hospital;

(10) Dr. Norman M. Beatty Memorial Hospital; and

(11) Northern Indiana Children's Hospital.
(Emphasis added.)

It is clear from the above statute that Muscatatuck State Hospital and Training Center is a "mental health institution" and is within the control of the department of mental health. Burns' § 22-5003(9) defines a "mental health institution" as any state owned and operated "psychiatric institution" under the control of the department of mental health. Thus, Muscatatuck State Hospital and Training Center is "an appropriate psychiatric institution" within the meaning of the statute (§ 9-1706a), pursuant to which appellant was committed.

From the foregoing it can be seen that the Department of Mental Health, pursuant to § 9-1706a, is to commit appellant to an appropriate institution; that the available scope of institutions, as set out in Burns' § 22-5009, includes the Muscatatuck State Hospital, the very institute to which appellant aspires; and that the decision concerning the appropriate institution for the appellant is properly to be made by the department. There is nothing to prevent the Department of Mental Health from eventually committing appellant to the institution he now desires. The choice lies within the professional and expert opinion of the department. It is not for appellant to dictate.

Appellant's argument, that the statute in question is unconstitutional because it imprisons appellant possibly for life, must fail. The legislature under its police power may provide for the safety, health, and general welfare. This necessarily includes the confinement, care and treatment of the mentally defective, retarded or insane.

Morgan v. State (1913), 179 Ind. 300, 101 N.E. 6; *Marx v. State* (1957), 236 Ind. 455, 141 N.E.2d 126; *State ex rel. Mavity v. Tyndall* (1946), 224 Ind. 364, 74 N.E.2d 914, cert. denied, 333 U.S. 834, 68 S.Ct. 609, 92 L.Ed. 1118, rehearing denied, 333 U.S. 858, 68 S.Ct. 732, 92 L.Ed. 1138.

Judgment affirmed.

Hunter, C.J., and Givan, J., concur.

Jackson, J., concurs in result.

DeBruler, J., dissents with opinion.

DISSENTING OPINION

DEBRULER, J.

The appellant was charged by affidavit with two robberies, totalling $9.00. Appellant is a twenty-seven year old deaf-mute, blind in one eye, who has never been to any school and has only a rudimentary understanding of sign language. He can neither read nor write.

Two psychiatrists and a teacher from the State School for the Deaf interviewed appellant and testified at the hearing on his competence to stand trial. They all agreed that appellant could not comprehend the nature of the charges against him nor assist in his defense because he had a mental deficiency and also because he had almost no means of communication other than a few gestures and pantomimes. They also agreed that there was almost no chance that appellant ever could improve his understanding sufficiently to be tried, even if he could gain a means of communication. However, the interpreter from the School for the Deaf stated that he knew of no facilities in this State which could help this appellant. He also stated the School for the Deaf did not accept mentally retarded persons. Thus, in effect, the commitment of appellant until he can comprehend the nature of the charges against him and assist in his defense is a commitment for life.

Burns' Ind. Stat. Ann. § 9-1706(a) provides for the commitment to the Department of Mental Health of a criminal defendant who is incompetent to stand trial because he "has not comprehension to understand the proceedings and make his defense." This commitment is for the purpose of giving the psychiatrists a chance to determine what can be done to alleviate the defendant's mental condition so that he can be tried, and a reasonable opportunity to achieve that goal. When the defendant's "sanity" is restored the commitment comes to an end because the purpose of the commitment has been accomplished.

That this is the rationale of the statute can be seen from the statutory language which says:

> "If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, *the trial shall not be delayed or continued* on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, *the trial shall be delayed or continued* on the ground

of the alleged insanity of the defendant. . . . Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same *as if no delay or postponement* had occurred by reason of defendant's insanity." Acts 1951, ch. 238, § 2, as last amended by Acts 1967, ch. 291, § 2, Burns' § 9-1706(a). (Emphasis added.)

The statute clearly contemplates a *delay* in the trial or a *postponement*, which implies that the commitment to the psychiatric institution is a temporary one.

When the defendant's condition is permanent, as in this case and he cannot be helped by any known psychiatric technique, then the defendant cannot be committed under this statute because the *purpose* of the commitment cannot be accomplished.

What then is the purpose of the confinement of this appellant whose condition is permanent. Punitive? Protection of society? Protection of the appellant? Confinement to serve any of these purposes based merely on a trial court finding that appellant "has not comprehension to understand the proceedings and make his defense" in my opinion would violate the due process clause of the 14th Amendment to the United States Constitution. Appellant has not been convicted of any crime, nor found to be dangerous to the community or himself. It has not been shown that he cannot continue to live in our society as he has for twenty-seven years. What conceivable basis is there for committing this appellant to a psychiatric institution for, what is in effect, life?

Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under Burns' § 9-1706(a), *supra*, would obviously be ended. Thus, the existence of *unproved criminal charges* operates to keep appellant confined in a state institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution. For a case interpreting the federal statutes on this point see *U.S. v. Curry* (1969), 410 F.2d 1372.

A permanent or open ended commitment under Burns' § 9-1706(a) would also violate the equal protection clause of the 14th Amendment to the United States Constitution. In order

to civilly commit a mentally deficient person the court would have to find that the person, because of a "psychiatric disorder," which includes mental deficiency, requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others of the community in which such persons reside. Burns' § 22-1201(1) and (2). There has never been such a finding in this case and there is no rational basis for treating appellant differently than another person who is to be civilly committed. The existence of criminal charges against appellant is not a rational basis for such a discrimination. *Baxstrom v. Herold* (1966), 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; *U.S. ex rel. Schuster v. Herold* (1969), 410 F.2d 1071.

The majority opinion, in effect, holds that this technique is within the State's police power to provide for the safety, health and general welfare. I strongly dissent. The majority opinion's summary disposition of this important federal question is not a correct resolution of this issue.

FILED
DEC 29 1970
E. ROBERT SEAVER, CL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. ~~3709~~ 70-5009

THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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CITATIONS
STATUTES, and
CONSTITUTIONAL PROVISIONS

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OCTOBER TERM, 1970

No. 5703

THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner, Theon Jackson, by his undersigned attorneys, having heretofore dule filed his Petition For Writ of Certiorari To The Supreme Court Of Indiana, now herein respectfully submits his Supplemental Brief concerning the following matters:

DIFFERENCES IN COMMITMENT PROCEDURES AND PROVISIONS FOR RELEASE

The comparison herein is between the

commitment of an insane person charged with a crime, and a feebleminded person needing care and treatment.

As to the former, the pertinent statute is the Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann., 1956 Repl., (1969 Supp.), Sec. 9-1706a:

> "When at any time before the trial of any criminal cause ***the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two (2) competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing other evidence may be introduced to prove the defendant's sanity or insanity. If the Court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find the defendant has not comprehension sufficient to understand the proceedings and make his defense, the

court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution. Whenever the defendant shall beome sane the superintendent of the sate psychiatric hospital shall certify the fact to the proper court, who shall enter the order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity."

The applicable statute for the commitment of feebleminded persons is as follows:

> Acts of the General Assembly of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907

"A reputable citizen of the county from which an application is to be made shall make an application *** under oath, setting forth information substantially as follows: The age, sex, race, general mental and physical condition, residence and legal settlement of the applicant, whether such applicant is under the charge of a guardian or parents and where known, the cause and duration of the feeble-minded condition and such other facts regarding the applicant's personal and family history as the trustees(commissioner of mental health) may require; which facts shall be submitted to the judge of the circuit court having jurisdiction over that county, together with a certificate of a reput-

able physician that the applicant is admissible under the rules of the board of trustees (commissioner of mental health), that he or she is feeble-minded and is not insane or epileptic, and is free from any infectious or contagious disease and from vermin. When such statements have been filed, the said judge shall appoint two (2) medical examiners who shall be physicians of not less than three (3) years' experience in the general practice of medicine and surgery, and not related to the person for whom application is made by consanguinity or marriage. It shall be the duty of said examiners to carefully and separately examine said person for whom application is made and separately certify in writing to said judge whether said person is a feeble-minded person and is not insane or epileptic. In his discretion, the judge may call additional witnesses until fully satisfied of the conditions as to feeble-mindedness of the person under inquiry. *** If it shall appear to the judge that the person is feeble-minded, he shall enter an order of commitment in the proper record, at the same time directing the clerk of the circuit court to forthwith apply to the superintendent of the institution for feeble-minded persons located in the district in which said county is situated, for the admission of said person to said institution, and to transmit with said application to said superintendent for his information, copies of all statements and certificates submitted, certified under the seal of the court.***"

From the above statutes the following differences are noted:

METHOD OF ACQUIRING JURISDICTION:

The Court having jurisdiction of the criminal charge against the defendant has jurisdiction to commit him for insanity prior to trial. The Court in which the application is filed, in a civil proceeding, in the county of residence of the feeble-minded person, has jurisdiction to commit the feeble-minded person.

EXAMINATION BY PHYSICIANS

There is a prior examination of the feeble-minded person before application is made and before the Court acquires jurisdiction, and that physician certifies in the first instance that the applicant is feeble-minded and that he is not insane. In both instances the Court having jurisdiction appoints two physicians to made examinations, but in the case of the feeble-minded person, they again must certify as to whether he is feeble-minded and not insane. It is noted that the statute, Burns 22-1907, supra, provides the certificate of the first physician that the applicant is not insane as a condition precedent to the proceedings.

ULTIMATE ISSUE DETERMINED BY COURT

In the case of the person charged with crime, the ultimate issue to be determined by the Court, as a condition precedent to commitment, is that the defendant has not comprehension sufficient to understand the proceedings and make his defense, but such finding is made upon evidence submitted to prove the defendant's insanity. In the case of the civil proceeding, the ultimate issue to be determined by the Court is that the applicant (the subject of the application, rather than the reputable citizen filing the application) is feeble-minded, after certification by physicians that the applicant is not insane.

COMMITMENT

In the criminal proceeding, the defendant is committed to Department of Mental Health, to be confined in an appropriate phychiatric institution. In the civil proceeding, the applicant is admitted to either the Muscatatuck State School or the the Fort Wayne State

School depending upon his place of residence in the State of Indiana, and whether there is room for him in one and not the other.

Acts of 1939, Ch. 119, Sec. 3, as found in Burns, (1964 Repl.), Sec. 22-1907, supra,

Acts of 1931, Ch. 38, Sec. 1, as amended, and as found in Burns, (1964 Repl.), Sec. 22-1901

RELEASE

As noted above, p. 3, the person charged with crime and committed to the Department of Mental Health by the Court having jurisdiction of the criminal proceedings, cannot be released until:

A. He becomes sane,

B. The Superintendent of the state psychiatric hospital certifies to the Court that he has become sane; or the Court has otherwise been "sufficiently advised of the defendant's restoration to sanity."

C. The Court, in either instance, orders the sheriff to return the defendant to court.

However, the feeble-minded person

may receive a furlough or discharge according to the rules and regulations of the Commissioner of Mental Health, subject to the requirement that no person shall be discharged from the Muscatatuck State School of the Fort Wayne State School until, in the judgment of the Superintendent, the "mental and physical condition of the patient justifies it."

Acts of the General Assembly of Indiana, 1931, Ch. 58, Sec. 1, as amended, and as found in Burns, (1964 Repl.), Sec. 22-1901

"The name of the Indiana School for Feeble-Minded Youth is hereby changed to the Fort Wayne State School; and the name of the Muscatatuck Colony, formerly the Indiana Farm Colony for Feeble-Minded is hereby changed to the Muscatatuck State School, which name shall apply to all statutes where the name of Muscatatuck Colony is now used."

Acts of 1939, Ch. 119, Sec. 4, as found in Burns, (1946 Repl.), Sec. 22-1908

"The respective board of trustees (commissioner of mental health) of each of said institutions is empowered to make such rules and regulations respecting the care, custody ***of patients, and the management of such institution and its affairs, as it may deem best for the interest of the patients and the state. *** All persons admitted to such institution shall, until properly dis-

charged from the same, be under the custody and control of the superintendent thereof, and such superintendent, subject to such regulations as the trustees (commissioner) see fit to adopt, may restrain and discipline any patient in such manner as he may judge is demanded for the welfare of the patient and the proper conduct of the institution. Furloughs and discharges may be given to the patients as provided by such regulations."

Acts of 1919, Ch. 94, Sec. 18, as found in Burns, (1964 Repl.), Sec. 22-1814

"Any person may be discharged from the colony at any time by the board of trustees (commissioner of mental health), provided only that no person shall be discharged from the said colony until, in the judgment of the superintendent, the mental and physical condition of the patient justifies it."

When the feeble-minded person is discharged, upon the determination of the Superintendent that his mental and physical condition justifies his discharge, there are no requirements whatsoever that he report to the court or any other place, and no requirements whatsoever that a judicial determination be made upon his condition, nor judicial approval of the Superintendent's determination. There is likewise no require-

ment that his condition as to being feeble-minded has changed. In fact, whenever an application for re-admission to the School is made, a new certificate is filed with the court by a physician that the feeble-minded person is still feeble-minded and not insane (among other things), and this certificate is then copied and certified by the Clerk of the Court to the proper school for the feeble-minded and serves as an application for readmission, without any further or new judicial determination being made.

Acts of 1947, Ch. 93, Sec. 1, as found in Burns, (1964 Repl.), Sec. 22-1910.

The person charged with crime and released from the psychiatric institution is not released from custody at all, but merely returned to the Court for trial and disposition of the criminal charge.

Acts of 1951, Ch. 238, Sec. 2, Burns Sec. 9-1706a, supra, p. 3,4

STATE FACILITIES TO WHICH ASSIGNED

The person charged with crime, commited

from Marion County under the insanity statute, supra, is as a matter of practice either assigned to the Dr. Norman M. Beatty Memmorial Hospital (formerly called the Northern Indiana Hospital), Div. For Maximum Security, or Central State Hosiptal (formerly the Central Indiana Hospital for Insane) in Indianapolis, Indiana. These, together with Richmond State Hospital, Logansport State Hospital, Evansville State Hospital, and Madison State Hospital are the Psyciatric Hospitals as listed in Burns, (1964 Repl.), Chapter 10, Sections 22-1001 to 22-1036.

Acts of 1881 (Spec. Sess.), ch. 67, Sec. 24, as found in Burns (1964 Repl. Sec. 22-1001

Acts of 1927, Ch. 47, Sec. 1, as found in Burns (1964 Repl.), Sec. 22-1002

Acts of 1927, Ch. 47, Sec. 2, as found in Burns (1964 Repl.), Sec. 22-1003

Acts of 1945, Ch. 358, Sec. 1, as found in Burns (1964 Repl.), Sec. 22-1004

However it is to be noted that for the first time, the Supreme Court of Indiana has held in its opinion in this case that psychiatric hospitals include the Muscatatuck State Hospital. Appendix A, p. 6a, Petition For Writ

of Certiorari To The Supreme Court Of Indiana.

The last information available to the undersigned pauper counsel for the Petitioner was that the Petitioner was assigned to and is still confined in Central State Hospital. Counsel are not aware that any persons committed under the insanity provisions of Burns Sec. 9-1706a, supra, p. 2 have ever been assigned to either of the two institutions for the care and treatment of feeble-minded persons on civil commitment.

EFFECT OF CRIMINAL CHARGES

Counsel for Petitioner are unaware of any authority to the effect that the pending criminal charges against Petitioner would have been a bar against his being committed under Burns Sec. 22-1907, supra; and if he had been on bond when he was committed under civil commitment to Muscatatuck (if such commitment had taken place), his being held in the custody of the State of Indiana would have been recognized as a legal excuse for the prevention of forfeiture of his bond.

Acts of 1961, Ch. 263, Sec. 10, as amended by Acts of 1963, Ch. 275, Sec. 2; prior to amendment by the Acts of 1969, Ch. 241, Sec. 5, which occured subsequent to the judgment in this case)

DISPOSITION OF CRIMINAL CHARGES

If the Petitioner had not been committed as an insane person under Burns Sec. 9-1706a, supra, and had been committed as a feebleminded person under Burns Sec. 22-1907, it would reasonably be expected that the Prosecuting Attorney for the 19th Judicial District (Marion County) would have dismissed the charges, as a practical matter, although counsel for the Petitioner are unaware of any statutory requirement that he do so. It is a frequent practice to dismiss criminal charges against a man who has been committed to a prison sentence on Federal charges while his case is pending in State court. Since he was committed as an insane person under Burns Sec. 9-1706a, supra, the charges will remain against him until he recovers his sanity -- which means until he dies. There is no statutory bar to a dismissal of the charges

while a person is being confined in a psychiatric hospital under the provisions of Burns Sec. 9-1706a, supra, but that statute certainly contemplates a trial when sanity is restored, and no dismissals have previously taken place. Counsel respectfully submit that a reversal of this cause by this Court as prayed herein will certainly give ample justification for the dismissal of the absurd criminal charges against a person with the mental age of a three (3) or four (4) year old child -- a deaf mute child-- which action the trial court should have recommended to the Prosecuting Attorney when that evidence was received at the hearing.

It is again submitted that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana, and that the same should be held to be in violation of the Eighth and the Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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FILE COPY

AUG 2 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-5009

THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Indiana, affirming the judgment of the Marion Criminal Court, Division I, committing the Petitioner, Theon Jackson, to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to said Court that the Petitioner is sane, is reported at 255 N.E. 2d 515, with dissenting opinion reported at 255 N.E. 2d 518; the said judgment of commitment appearing in the Appendix

in this cause at p. 10, the majority opinion of the Supreme Court of Indiana appearing in said Appendix at p. 23, and the dissenting opinion of DeBruler, J. appearing in said Appendix at p. 29.

Upon Petition for Rehearing duly filed the Supreme Court of Indiana denied the same without opinion, (A. p. 31), with two Justices dissenting: Jackson and DeBruler, JJ.

JURISDICTION

The Supreme Court of Indiana entered its opinion affirming said Judgment of commitment on February 19, 1970. Petitioner's Petition For Rehearing was thereafter duly filed on March 11, 1970, denied on May 14, 1970, without opinion, and Petition For Writ Of Certiorari duly filed thereafter with the Clerk of this Court on August 11, 1970.

Thereafter on March 22, 1971, this Court granted Petitioner's motion for leave to proceed in *forma pauperis* and said Petition For Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Eighth and Fourteenth Amendments of the Constitution of the United States of America, to-wit:

EIGHTH AMENDMENT:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

FOURTEENTH AMENDMENT:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due proc-

ess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The applicable provision of the Constitution of the State of Indiana is Article 1, Section 12, to-wit:

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

The Indiana statutes involved in this cause and the questions presented are as follows:

The judgment of the trial court was based upon the Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann., 1956 Repl., (1969 Supp.), Sec. 9-1706a. Under subsequent legislation this statute is now contained in Indiana Code of 1971, Title 35, Article 5, Chapter 3, Section 2:

> "When at any time before the trial of any criminal cause * * *the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two (2) competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing other evidence may be introduced to prove the defendant's sanity or insanity. If the Court shall find that the defend- has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make

his defense, the trial shall be delay or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution. Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity."

The applicable statutes for the commitment and discharge of feebleminded persons are as follows:

Acts of the General Assembly of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907; presently contained in I.C. 1971, 16-15-1-3

"A reputable citizen of the county from which an application is to be made shall make an application * * * setting forth information substantially as follows: * * * the cause and duration of the feebleminded condition * * * together with a certificate of a reputable physician that the applicant is admissible under the rules of the board of trustees, that he or she is feeble-minded and *is not insane* * * *." (emphasis added)

Acts of the General Assembly of Indiana, 1919, Ch. 94, Sec. 18, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1814; presently contained in I.C. 1971, 16-15-4-12

"Any person may be discharged from the colony at any time by the board of trustees (commissioner of mental health), provided only that no person shall be discharged from the said colony until, in the judgment of the superintendent, the mental and physical condition of the patient justifies it."

Acts of the General Assembly of Indiana, 1931, Ch. 38, Sec. 1, as amended, and as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1901; presently contained in I.C. 1971, 16-15-3-1

"The name of the Indiana School for Feeble-Minded Youth is hereby changed to the Fort Wayne State Hospital and Training Center; and the name of the Muscatatuck Colony, shall be known as the 'Muscatatuck State Hospital and Training Center,' which name shall apply to all statutes where the name of Muscatatuck Colony, or Muscatatuck State School is now used."

Acts of 1939, Ch. 119, Sec. 4, as found in Burns, Ind. Stat. Ann., 1964 Repl., Sec. 22-1908; presently contained in I.C. 1971, 16-15-1-4

"The respective board of trustees (commissioner of mental health) of each of said institutions is empowered to make such rules and regulations respecting the care, custody * * * of patients, and the management of such institution and its affairs, as it may deem best for the interest of the patients and the state. * * * All persons admitted to such institution shall, until properly discharged from the same, be under the custody and control of the superintendent thereof, and such superintendent, subject to such regulations as the trustees (commissioner) see fit to adopt, may restrain and discipline any patient in such manner as he may judge is demanded for the welfare of the patient and the proper conduct of the institution. Furloughs and discharges may be given to the patients as provided by such regulations."

Acts of 1947, Ch. 93, Sec. 1, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1910; presently contained in I.C. 1971, 16-15-2-1

"No person who has ever been adjudged feeble-minded according to law and has been formally discharged from either of the state schools for feeble-minded, shall again be admitted to any such school unless and until a sworn statement is filed, with the cuit court of the county in which such discharged inmate resides, by a reputable physician who is licensed to practice medicine in this state, declaring that such physician is acquainted with such inmate and that such inmate was formerly adjudged feeble-minded; that such inmate has legal residence in Indiana; that such inmate * * * *is still feeble-minded, not insane,* * * * and a proper subject for conveyance and admission to said state school. * * * Such statement shall be filed and kept with the clerk of such court and a transcript thereof certified by him shall be under the seal of the circuit court, shall be transmitted to the proper school for the feeble-minded * * * and shall serve as an application for readmission and be acted upon by the authorities of the state school in the same manner as they act upon any request for admission. * * *"

(emphasis added)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Indiana Courts violated the dictates of the Eighth Amendment of the Constitution of the United States by ordering the confinement of the Petitioner, a feeble-minded deaf mute, until he has "become sane" as a commitment under a criminal charge (two charges, with joint sanity hearing) as distinguished from a civil commitment, such confinement amounting to a life sentence resulting from the lodging of the criminal charges, without trial thereof, constituting cruel and unusual punishment.

2. Whether the Indiana Courts violated the dictates of the Fourteenth Amendment of the Constitution of the United States by applying a statute concerning the insane,

ordering the confinement of the Petitioner, a feeble-minded deaf mute, until he has "become sane", confining him for little solely because he has been *charged* with a crime(s) for which he has not and will not be tried, (and as to which charges there have not even been any judicial determinations made that the incidents occurred, in respect to probable cause), and which he was incapable of committing, as crimes.

STATEMENT OF THE CASE

The Petitioner was charged in Indianapolis, Marion County, Indiana, with the criminal offense of robbery, in two (2) separate causes, by affidavits. The first charge, filed May 6, 1968, (A. pp. 1-2) charged the petitioner with having committed a robbery on July 28, 1967, (A. p. 1), and the second affidavit, filed May 6, 1968, (A. pp. 2, 3) charged the Petitioner with having committed a robbery on July 22, 1967. (A. p. 3) In each case the Petitioner waived arraignment and entered a plea of "not guilty", (A. pp. 2, 3) and on September 13, 1968, the counsel for Petitioner, stating that he had been unable to communicate with the Petitioner with respect to the question of jury waiver, requested that the causes be set on the Jury docket. (A. p. 5)

Thereafter on October 23, 1968, the court made an entry and order in both cases, stating that: (A. p. 6)

> "Court being duly advised that defendant might lack Comprehension Sufficient to Understand the Nature of Charges against him and to Aid his counsel in his own defense. Court now appoints Dr. Nie and Dr. Schuster to examine the defendant as to same."

n the joint report of the appointed doctors filed Nov. 12, 968, observing that Petitioner does not hear and does not ommunicate except through sign language and some pantoine, that further stated that Petitioner

> "* * * is mentally defective and coupled with his severe hearing loss and communication loss that he can neither understand the nature of the charge against

him nor can he adequately participate in preparing his own defense."

(A. pp. 6, 7)

On December 18, 1968, the trial court held a hearing in respect to Petitioner, as defendant in both said cases, concerning his mental condition, (A. p. 7) and on December 26, 1968, found that:

"* * * defendant lacks comprehension sufficient to make his defense"

and entered the following order:

(A. p. 7)

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane."

At the hearing Dr. Dwight Schuster testified that the Petitioner is a deaf mute, mentally defective, could only understand a very limited number of deaf mute signs, does not understand the nature of the charges against him and cannot comprehend sufficiently to make his defense. (A. pp. 13-14) As to a "cure" of Petitioner's condition, it would consist of his learning the deaf mute sign language if he is capable of so doing, but the Doctor stated that he questioned how much ability the Petitioner has, and then stated that therefore the prognosis appears rather dim—that he didn't think he (and a Mr. Olson, deaf mute interpreter) ever got through to the Petitioner—that Petitioner is insane if that means unable to comprehend the nature of the charges and to assist his attorney in his defense—that he, the Doctor, does not believe his, the Petitioner's, "sanity" could be restored after commitment to the State Department of Mental Health—and that the mental defect of the Petitoner is what is sometimes referred to in the law as feebleminded-ness, mental retardation, the mental level of the Petitioner being a pre-school level. (A. pp. 14-15)

The other appointed Doctor, Dr. Louis W. Nie, testified that even if the Petitioner were not a deaf mute, he would still lack the necessary comprehension, and that he, the Doctor, doubted that the basic intelligence of the Petitioner, even if he could develop communication, would enable him to communicate effectively and to participate in a knowing, understandable way in his defense. (A. pp. 15-16)

The interpretor who worked with the Doctors, John Olson, a supervising teacher of the High School Department of the School For The Deaf (Indiana), testified that the level of mental comprehension of the Petitioner is about a three (3) or four (4) year old deaf child—that there isn't anything in the State of Indiana in the nature of facilities which could, after a length of time, aid the Petitioner to understand the nature of the charges and assist in the defense. (A. p. 18-21)

The counsel for Petitioner duly filed a motion for new trial in both cases, contending therein that the decision of the court is not sustained by sufficient evidence and is contrary to law, and pointing out that there was no evidence that the Petitioner was insane, that the evidence shows and establishes that his "sanity" cannot be restored, that he must, therefore, be considered as having been committed for the rest of his life, without conviction of any crime, in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. (Ap. pp. 8-10)

Following the overruling of the motion for new trial, (A. pp. 10-11) the transcript of the record and assignment of errors was duly filed with the Clerk of the Supreme Court of Indiana, in which assignment of errors Petitioner, by counsel, contended that the trial court had erred in overruling the motion for new trial. (R. 1A, both Transcripts)

In Petitioner's briefs his counsel duly contended, with appropriate citations, that without mental capacity there is no criminal intent, that without criminal intent there is no

crime, that the Petitioner, being incapable of understanding the nature of the charges brought against him and unable to "recover" his "sanity" has been sentenced to life imprisonment, in violation of Article 1, Section 12 of the Constitution of Indiana, and the Eighth and Fourteenth Amendments of the Constitution of the United States.

The Supreme Court of Indiana, in its opinion affirming the order of commitment, (A. pp. 23-27) held that the Petitioner had not been denied due process of law, did not mention Appellant's contention in respect to the Eighth Amendment of the Constitution of the United States, but did hold that as to the imprisonment for life, the legislature under its police power may provide for the safety, health, and general welfare, including the confinement, care and treatment of the mentally defective, retarded or insane.

The dissenting opinion of Justice DeBruler, filed at the same time (A. pp. 29-31) points out that the Petitioner cannot be committed under the state statute in question because the purpose of the commitment, to provide for treatment and trial in the future, cannot be accomplished, that the confinement of Petitioner for life on the basis of the existence of criminal charges against him, unproven, is in violation of the due process clause of the 14th Amendment to the United States Constitution, as well as the equal protection clause of that Amendment.

Petitioner duly reiterated the same contentions of violation of the Eighth and Fourteenth Amendments of the Constitution of the United States in his Petition For Rehearing duly filed following the decision of the Supreme Court of Indiana, which Petition For Rehearing was thereafter denied without opinion by the Supreme Court of Indiana. (A. p. 31)

SUMMARY OF ARGUMENT

The Petitioner, a deaf mute having a mental age of three or four, with almost an entire lack of communication with the society in which he lived, lacked specific knowledge and comprehension of the nature and consequences of the criminal acts with which he was charged, was incapable of committing a crime, has not been convicted of any crime, is unable to understand the nature of the charges brought against him, is unable to "recover" his "sanity", but has been sentenced to life imprisonment. This constitutes cruel and unusual punishment, in violation of the Eighth Amendment of the Constitution of the United States; and further constitutes a denial by the State of Indiana of Petitioner's right to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT

I.

THE CONFINEMENT OF THE PETITIONER, A FEEBLE-MINDED DEAF MUTE, UNTIL HE HAS "BECOME SANE" AS A COMMITMENT UNDER TWO CRIMINAL CHARGES, (AS DISTINGUISHED FROM A CIVIL COMMITMENT), WITHOUT TRIAL THEREOF, AMOUNTS TO A LIFE SENTENCE RESULTING FROM THE MERE LODGING OF THE CRIMINAL CHARGES, AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

The uncontradicted evidence in the hearing held in the Marion Criminal Court, Division I, pursuant to the Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann. 1956 Repl., (1969) Supp.), Sec. 9-1706a, set out hereinabove at pp. 3, 4 of this Brief, established that:

1. The Petitioner is mentally defective, and cannot understand the nature of the charges against him. (A. p. 13)

2. The Petitioner, in addition to mental defect, is a deaf mute. (A. p. 13)

3. The Petitioner does not have sufficient comprehension to understand the nature of the charges or to make his defense. (A. p. 14)

4. If you equate insanity with being unable to comprehend the nature of the charges and to assist his attorney in his defense, Petitioner's sanity could not be "restored." (A. p. 15)

5. The mental defect is what is referred to in the law as feeblemindedness, mental retardation. (A. p. 15)

6. Even if Petitioner were not a deaf mute, he would still lack the necessary comprehension. (A. p. 16)

7. Petitioner's mental comprehension is about that of a three or four year old deaf child. (A. p. 20)

If Petitioner were committed to the institution designed for treatment and care of the feebleminded, under a civil commitment pursuant to the provisions of the Acts of the General Assembly, of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907, set out hereinabove at p. 6 of this Brief, it would be upon certification by a reputable physician that he is *not insane*; and he would be eligible for discharge merely upon the determination of the superintendent that "the mental and physical condition of the (Petitioner) justifies it." Acts of 1919, Ch. 94, Sec. 18, as found in Burns (1964 Repl.), Sec. 22-1814 (set out hereinabove at p. 5 of this Brief) But obviously the commitment in this case, "until he shall become sane", is for life.

Without mental capacity there is no criminal intent, and without criminal intent there is no crime, *Fritz v. State of Indiana* (1912), 178 Ind. 463, 466, 99 N.E. 727, and it is not just a vague and general differentiation between right and wrong that indicates criminal responsibility, but rather specific knowledge and comprehension of the nature and consequences of the act with which the defendant is charged.

Flowers v. State of Indiana (1956), 236 Ind. 151, 163, 161; 139 N.E.2d 185. It is that comprehension that Petitioner, having a mental age of three or four, with almost an entire lack of communication with the society in which he lived, lacked. Being incapable of committing a crime, not having been convicted of any crime, being unable to understand the nature of the charges brought against him, and being unable to "recover" his "sanity", he has been sentenced for live imprisonment. Under such circumstances it is respectfully submitted that life imprisonment *is* punishment, cruel and unusual, in violation of the Eighth Amendment of the Constitution of the United States, *supra*, p. 2. *Weems v. United States* (1910) 217 U.S. 349; *Powell v. Texas* (1968) 392 U.S. 514; *Robinson v. California* (1962) 370 U.S. 660.

As pointed out in the dissenting opinion of Judge DeBruler, the statute under which the proceedings were held and the Petitioner committed clearly contemplates a *delay* in the trial or a *postponment*, implying that the commitment to a psychiatric institution is temporary and that trial will be held at a later date. (A. p. 30) The Supreme Judicial Court of Massachusetts has held that such a statute permitting confinement of a mentally ill petitioner who had been charged with crime but not tried, could only be sustained as a *non-penal* statute if the remedial aspect of confinement had foundation in fact, *Nason v. Superintendent of Bridgewater State Hospital* (1968). In the Supreme Judicial Court of Massachusetts, 233 N.E. 2d 908. It is clear in the case at bar that in respect to restoration to sanity the "remedial aspect of confinement" is non-existent, and therefore the effect of the commitment for life must be construed as penal, based on the existence of criminal charges rather than conviction of crime, and clearly cruel and unusual punishment.

As provided in the statute under which the Petitioner was committed, he cannot be released from confinement until he becomes "sane," and either the Superintendent of

the state psychiatric hospital certifies to the Court that he has become sane, or the Court has otherwise been "sufficiently advised of the defendant's restoration to sanity." (*supra*, p. 4) Rightly or wrongly, sanity has been and is treated as the equivalent of comprehension of the nature of the criminal action, the proceedings thereon, and comprehension sufficient to make and assist in the Petitioner's own defense. Thus a restoration to sanity can never be certified by the Superintendent of the hospital where Petitioner is confined for the rest of his life, and cannot be found to exist by the Court.

On the other hand a feeble-minded person civilly committed pursuant to law, *supra*, pp. 5 and 6, has already been certified as *not insane* as a condition precedent to his commitment, and may receive a furlough or discharge according to the rules and regulations of the Commissioners of Mental Health, subject to the requirement that he cannot be discharged from the Muscatatuck State School or the Fort Wayne State School until, in the judgment of the Superintendent, the "mental and physical condition of the patient justifies it."

When a feeble-minded person is discharged, upon the determination of the Superintendent that his mental and physical condition justifies his discharge, there are no requirements whatsoever that he report to the court or any other place, and no requirements whatsoever that a judicial determination be made upon his condition, nor judicial approval of the Superintendent's determination. There is likewise no requirement that his condition as to being feeble-minded has changed—whenever an application for re-admission to the School is made, a new certificate is all that is required, filled out by a physician, filed with the Court, and certified by the Clerk of the Court to the proper School, stating that the person is *still* feeble-minded, *not* insane, etc. Acts of 1947, Ch. 93, Sec. 1, as found in Burns Ind. Stat. Ann. 1964 Repl., Sec. 22-1910, I.C. 1971, 16-15-2-1, *supra*, p. 6. There is no Indiana authority that the pending criminal

charges against Petitioner would have been a bar to his commitment to Muscatatuck as a feeble-minded person; and if he had been so committed under the civil procedure it would reasonably be expected that the Prosecuting Attorney would have dismissed the charges, as a practical matter, although there is no statutory requirement that he do so. Since he was in fact committed as an insane person under Burns Sec. 9-1706a, *supra*, pp. 3, 4, the charges will remain against him until he recovers his sanity—which means until he dies.

Counsel respectfully submit that a reversal of this cause by this Court will provide ample justification for the dismissal of the absurd criminal charges against this person with a mental age of three (3) or four (4) year old child—a deaf mute child—which action, it is respectfully submitted, the trial Court should have recommended to the Prosecuting Attorney when that evidence was received in the hearing—and should have done on the Court's own motion if the Prosecuting Attorney refused to do so. The fact that there was no statutory precedent for such action was certainly not justification for using a statute designed for remedial procedure for the insane, securing their treatment while awaiting trial, to provide instead for the life imprisonment of this half-blind deaf mute with the mental age of three (3) or four (4).

II.

THE CONFINEMENT OF THE PETITIONER, A FEEBLE-MINDED DEAF MUTE, UNTIL HE HAS "BECOME SANE" AS A COMMITMENT UNDER TWO CRIMINAL CHARGES, CONFINING HIM FOR LIFE SOLELY BECAUSE HE HAS BEEN CHARGED WITH TWO CRIMES, FOR WHICH HE HAS NOT AND WILL NOT BE TRIED (AND AS TO WHICH CHARGES THERE HAS NOT EVEN BEEN ANY JUDICIAL DETERMINATION MADE THAT THE INCIDENTS OCCURRED, IN RESPECT TO PROBABLE CAUSE), AND WHICH HE WAS INCAPABLE OF COMMITTING, AS CRIMES, IS A VIOLATION BY THE STATE OF INDIANA OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Without repeating herein the uncontradicted evidence in the mental hearing in the trial Court, *supra,* pp. 11, 12, we respectfully request herein that the same be noted under this point also.

The Petitioner, a man with the mental comprehension equal to that of a three or four year old child, who is also a deaf mute, has, because of the *existence* of two pending criminal *charges* against him, been committed to confinement for life. He does not have, and can not in the future have comprehension which is sufficient to make his defense to the criminal charges of robbery lodged against him. He is not insane, unless all feebleminded persons with a mental level of a three or four year old child are insane. In addition to his admitted mental deficiency he is deaf and unable to speak. It does not seem possible in this day and age, but this man without communication and with the brain of a small child has been sentenced to life imprisonment. As pointed out above at p. 12, he is incapable of committing a criminal act, as such, and if the State of Indiana did indeed commit him for treatment and care as a feebleminded person (with certification that he is not insane), he would be eligible for discharge merely upon the determination of the superintendent that "the mental and physical condition

of the [Petitioner] jusitifies it." Acts of 1919, Ch. 94, Sec. 18, as found in *Burns* (1964 Repl.), Sec. 22-1814 (set out hereinabove at p. 5 of this Brief.)

It is respectfully submitted that as a matter of due process of law, under the Fourteenth Amendment of the Constitution of the United States, when it was established without contradiction that the Petitioner lacked comprehension, was feebleminded, had the mental capacity of a three or four year old deaf child, and was obviously therefore not criminally responsible for his acts, the State of Indiana should have been required to dismiss the criminal charges against the Petitioner, and commence proceedings for his commitment as a feebleminded patient to the appropriate State institution. There was at no time a judicial determination of probable cause, but it is obvious that no supportable determination of probable cause could have been made, since the Petitioner was incapable of committing a crime. There was simply no basis for the continuation of criminal charges against the Petitioner, any more than such charges could have been maintained against a defendant found to be only four years old. The commitment of Petitioner for life is neither fair nor just, and he has been deprived of due process and due course of law, and denied justice, to which he is entitled without denial, speedily, and without delay. Fourteenth Amendment of the Constitution of the United States; Article 1, Sec. 12, Constitution of the State of Indiana.

As stated by Justice DeBruler, in his dissenting opinion: (A., pp. 30, 31) (255 N.E.2d 518, 519)

> "Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under Burns Sec. 9-1706(a) *supra,* would obviously be ended. Thus the existence of *unproved criminal charges* operates to keep appel-

> lant confined in a state institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution. For a case interpreting the federal statutes on this point see U.S. v. Curry (1969), 410 F.2d 1372.
>
> * * *
>
> There is no rational basis for treating appellant differently than another person who is to be civilly committed. The existence of criminal charges against appellant is not a rational basis for such a discrimination. *Buxtrom v. Herold* (1966), 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed. 2d 620; *U.S. ex rel. Schuster v. Herold* (1969), 410 F.2d 1071."

In the case of *Nason v. Superintendent of Bridgewater State Hospital, supra,* p. 13, after the Supreme Judicial Court of Massachusetts had pointed out that a statute permitting confinement of a mentally ill person who had been charged with crime but not tried could only be sustained as a non-penal statute if the remedial aspect of confinement had foundation in fact, that Court further stated: (233 N.E.2d at 913)

> "Confinement of mentally ill persons, not found guilty of crime, without affording them reasonable treatment also raises serious questions of deprivation of liberty without due process of law."

In the case at bar, reasonable treatment, it is respectfully submitted, would include the opportunity for furlough and discharge that is available to persons, feeble-minded, who have been committed under the civil procedure, as patients, when their mental and physical condition justifies such furlough and discharge.

Except for the clearly-established mental deficiency which, in the opinion of Counsel, rules out possible criminal liability, this deaf mute would be entitled to trial even though lack of communication would prevent the usually-required level of comprehension of the proceedings, nature of the charges, and the comprehension necessary to assist in his

defense. *Klopfer v. North Carolina* (1967), 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1; *The People ex rel. Myers, on behalf of Lang v. Briggs, Director,* (1970) 46 Ill. 2d 281, 263 N.E. 2d 109.

CONCLUSION

The Petitioner, by his undersigned counsel, respectfully submits that upon review of the judgment and opinion of the Supreme Court of Indiana, the same should be held in violation of the Eighth and the Fourteenth Amendments of the Constitution of the United States, and that upon reversal of the judgment, the State of Indiana be required to dismiss the criminal charges after adequate and reasonable opportunity has been afforded to secure the civil commitment of the Petitioner as a feeble-minded person under the laws of the State of Indiana.

Respectfully submitted,

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IN THE

Supreme Court of The United States

No. 70-5009

THEON JACKSON,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of The United States

No. 70-5009

THEON JACKSON,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

Whether Jackson's commitment to the Indiana Department of Mental Health under Burns § 9-1706a, as incompetent to stand trial on two charges of robbery, constitutes a violation of:

a) The proscription against the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States;

b) the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; or,

c) The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On May 6, 1968, Petitioner, Theon Jackson, hereafter referred to as Jackson, was charged with two separate counts of robbery. (A. 1-3). Subsequently, Jackson, by counsel, moved for the appointment of an interperter, alleging that he was a deaf mute, uneducated, unable to understand, read, write or speak the English language or to communicate with counsel in general. (A. 4-5). Being duly advised that Jackson might lack sufficient comprehension to understand the nature of the charges against him and to aid his counsel in his defense, the Marion Criminal Court, Division 1, the state court having jurisdiction to try Jackson on the robbery charges, appointed two psychiatrists to examine him for the purpose of determining whether he was competent to stand trial. (A. 6). On December 18, 1968, a hearing was held in criminal court to determine whether Jackson lacked sufficient comprehension to stand trial. (A. 7). On December 26, 1968, the Marion Criminal Court found that Jackson lacked sufficient comprehension to make a defense and ordered him committed to the Indiana Department of Mental Health until competent to stand trial. (A. 7). The evidence adduced at the hearing in Marion Criminal Court fully supported the findings of that court. (A. 13-21). On appeal, the Indiana Supreme Court affirmed the judgment of the Marion Criminal Court. Jackson challenges the validity of the decision of the Indiana Supreme Court in this case.

Jackson is a deaf mute. (A. 13, 15). He could not read, write, speak, hear or communicate by sign language to a degree that he could have assisted in his defense as of December 26, 1968, the day of his commitment. (A. 13, 14, 16, 20). As of that day he had the mental comprehension of a three or four year old deaf child.

Jackson was born in Greenwood, Mississippi. At the time of the hearing in the Marion Criminal Court he was twenty-seven years old. He was born deaf and has been a deaf mute all his life. He never attended school in Greenwood, Mississippi. While in Mississippi he worked in the building construction business. After moving to Indianapolis he worked at a local Holiday Inn helping in the kitchen. Also, since moving to Indianapolis, the Deaf and Dumb School had undertaken to teach Jackson some basic communication skills. At the time of the hearing, he had taken lessons from the Deaf and Dumb School some three years. The lessons had ceased only when Jackson was arrested. (A. 17-18).

Jackson can write and read his own name. (A. 13, 16). He knows a limited number of deaf mutes signs. (A. 13-14). Although Jackson lacked sufficient comprehension to stand trial, he was able to understand a little of what the examining psychiatrist sought to communicate to him. (A. 13). Jackson was able to grasp a few things. (A. 14). In the opinion of the examining psychiatrist, Jackson knew the basic differences between right and wrong. (A. 16, 20). Although the examining psychiatrists were convinced that Jackson lacked sufficient comprehension to stand trial, they could not say that Jackson could never obtain sufficient comprehension to stand trial. (A. 14, 15).

SUMMARY OF ARGUMENT

A starting point in this case is that physchiatry is an inexact science. Accordingly, Jackson's basic premise that he is permanently incompetent to stand trial is speculative at best.

Jackson's commitment does not constitute cruel and unusual punishment in violation of the Eighth Amendment. Jackson has neither been convicted of, nor sentenced for, a crime. The primary purpose of the proscription against cruel and unusual punishment is relevant to the fitness of the punishment imposed. Jackson has not been punished. Jackson's commitment differs not in the slightest from any involuntary commitment.

Similarly, Jackson's contentions that his commitment is in violation of the Due Process Clause of the Fourteenth Amendment must also fall. Jackson was accorded the full procedural safeguards demanded by the Due Process Clause. Significantly, the Due Process Clause of the Fourteenth Amendment, upon which Jackson bases his claim, bars the state from trying Jackson on the robbery charges pending against him. Furthermore, surely the Due Process Clause does not require Jackson's discharge on the criminal charges pending against him for his present incompetency to stand trial. Should Jackson recover, and it cannot be said that he will not, his present incompetency could effectively absolve Jackson of all criminal responsibility for the acts of robbery themselves, even though there has been no trial on the merits to determine whether Jackson committed the acts charged and if so whether he was criminally responsible at the time they were committed.

Jackson's equal protection question hinges on whether Jackson's commitment under Burns § 9-1706a, rather than

under Burns § 22-1907, violates the Equal Protection Clause of the Fourteenth Amendment. Jackson claims he can obtain a discharge under Burns § 22-1907, but not under Burns § 9-1706a. Jackson's claim is based on neither logic nor authority. First of all, a commitment under Burns § 22-1907 may in itself raise grave constitutional questions. It would appear that in a commitment under Burns § 22-1907, the Department of Mental Health may retain some sort of permanent authority over an individual committed under that statute. Secondly, if Jackson's premise that his condition will never change or improve is accepted as true, then Jackson can never obtain a discharge under either Burns § 9-1706a or Burns § 22-1907. And finally, if Jackson's mental condition ever does change or improve he would be entitled to discharge under Burns § 9-1706a before he would ever be entitled to discharge under Burns § 22-1907. Under Burns § 9-1706a all Jackson need do is acquire the ability to communicate. Whereas, under Burns § 22-1907, Jackson would have to satisfy the superintendent of the institution to which he was committed that his mental and physical condition justified discharge, a matter he would be unable to do unless able to communicate.

The Indiana scheme for dealing with individuals in Jackson's condition does not violate the Constitution of the United States. Therefore, the decision of the Indiana Supreme Court should be affirmed.

ARGUMENT

JACKSON'S COMMITMENT UNDER BURNS' § 9-1706a AS INCOMPETENT TO STAND TRIAL ON TWO CHARGES OF ROBBERY DOES NOT CONSTITUTE A VIOLATION OF THE PROSCRIPTION AGAINST THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Jackson characterizes his commitment as imprisonment, a life sentence, a denial of the due process of the law and denial of the equal protection of the laws. Respondent, hereafter referred to as the State, submits that Jackson's commitment to the Indiana Department of Mental Health is none of these. However, before the State addresses itself to the issues raised by Jackson, two preliminary matters must be considered. The first goes to what this case does not involve. The second tests Jackson's basic contention that he will never obtain sufficient comprehension to stand trial.

This case does not involve a commitment without a hearing or a commitment under a procedure significantly different from that afforded an individual not charged with a crime, *See, E.g., Specht v. Patterson,* 386 U.S. 605 (1967); *Baxstrom v. Herold,* 383 U.S. 107 (1966); *United States ex rel. Schuster v. Herold,* 410 F.2d 1071 (2nd Cir. 1969). This case does not involve a commitment to an institution maintained and controlled by the Indiana Department of Corrections. See, *E.g. Baxstrom v. Herold,*

supra. This case does not involve a conviction for a physical or mental condition over which Jackson had no control. Jackson has been convicted of no crime. See, e.g., *Robinson v. California,* 370 U.S. 660 (1962). This case does not involve a question of whether Jackson is receiving adequate treatment or whether the hospital facilities are adequate. See, E.g., *Nason v. Superintendent of Bridgewater State Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968).

Secondly, Jackson's basic premise that he is permanently incompetent to stand trial is based on tenuous psychiatric speculation. Psychiatry is not an exact science. Whether it will ever be an exact science is highly questionable. The record shows that at the time of his commitment, on December 26, 1968, Jackson lacked sufficient comprehension to assist in his defense. (A. 13, 14, 16, 20). The record shows that this was because Jackson lacked a knowledge of the deaf mute signs with which to communicate with his interpreters. (A. 14). The record also shows there is a question as to Jackson's mental ability to achieve a degree of facility with sign language to enable him to stand trial for robbery. (A. 14). The record shows that Jackson has assumed a certain amount of responsibility for himself before arrested on charges of robbery. Although he had obtained no formal education prior to moving to Indianapolis, Indiana, he had worked in the building construction trade in Greenwood, Mississippi, and in the kitchen of a local Holiday Inn after moving to Indianapolis. Furthermore, one Mrs. Johnson had taught Jackson three days a week for some three years prior to the time he was arrested. (A. 17, 18). Jackson knew a limited number of deaf mute signs. (A. 13, 14). He was able to understand a little of what the examining psychiatrist sought to com-

municate to him. (A. 13). But he did know the basic differences between right and wrong. (A. 16, 20). No one who testified at the commitment hearing in the Marion Criminal Court could say that Jackson had not the ability to ever grasp a sufficient degree of ability to communicate by sign language to enable him to stand trial on robbery charges. (A. 14, 15).

In *Greenwood v. United States,* 350 U.S. 366 (1956), this Court was faced with a fact situation similar to the case at hand to which it applied 18 U.S.C. §§ 4244-4248, the federal competency statute. Greenwood was incompetent to stand trial and thought unlikely to recover. In other words, at the time this Court reviewed Greenwood's commitment, it was regarded as permanent. Nevertheless, this Court upheld Greenwood's commitment. Justice Frankfurter, the author of this Court's opinion, noted with skeptism that:

> ". . . The record shows that two court-appointed psychiatrists found petitioner sane and competent for trial. While the District Court did not accept their conclusion, the testimony illustrated the uncertainty of diagnoses in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment, even about a situation as unpromising as petitioners, at least as indicated by the report of the United States Medical Center at Springfield. . . ." 350 U.S., at p. 375.

Justice Frankfurter went on to caution that:

> ". . . Certainly, denial of constitutional power of commitment to Congress in dealing with a situation like this ought not rest on dogmatic adherence to one view or another on controversial psychiatric issues. . . ." 350 U.S., at p. 376.

Justice Frankfurter's skeptism was well founded for apparently Greenwood subsequently recovered and was tried and convicted. See Caleb Foote, *A Comment On Pre-Trial Commitment Of Criminal Defendants,* 108 U. Pa. L. Rev. 833, 838 (1960); See also, *Brown v. Peterson,* 429 F.2d 585 (8th Cir. 1970), (same result).

Jackson's basic premise is that he is permanently incompetent to stand trial on the two robbery charges lodged against him. Jackson's incompetence stems from his inability to communicate with his counsel. Jackson argues that he is incapable of ever achieving sufficient communicative skills to aid in his defense and that hence he is permanently incompetent. For the purposes of this argument, the State will accept Jackson's premise that he was incompetent at the time of his commitment to communicate with his attorneys and that Jackson *may never* achieve sufficient communicative skills to assist in his defense. However, the State does so cautiously and respectfully requests this Court to do likewise.

A) Jackson's Commitment Was Neither Cruel and Unusual Punishment Nor A Deprivation of The Due Process Of The Laws.

Jackson makes certain allegations of fact regarding the nature and circumstances of this case, cites authorities, claims cruel and unusual punishment and a violation of the due process of the laws, but fails to point out in what way these constitutional provisions are violated. The record shows that Jackson stands accused of having perpetrated a robbery against two different persons on two different occasions. (A. 1-3). Before he was tried on those charges, a court of competent jurisdiction, after an adversary hearing at which Jackson was represented by

counsel, determined that Jackson was incompetent to stand trial on the robbery charges. (A. 7). Accordingly, he was committed to the Indiana Department of Mental Health until such time as he was competent to stand trial on the robbery charges. (A. 7). Jackson characterizes his commitment as a penal sentence to life imprisonment. Jackson also claims that he lacked criminal responsibility at the time of the commission of the offense, that his confinement is permanent and non-remedial and that the sole basis of his commitment are two unproved criminal charges. Jackson claims that these facts and circumstances constitute cruel and unusual punishment and a deprivation of the due process of the laws. The State submits that Jackson has mischaracterized the nature and circumstances of his commitment and that Jackson's commitment does not constitute cruel and unusual punishment or a deprivation of the due process of the law. Since Jackson argues that the same facts and circumstances constitute a violation of both Amendments to the Constitution and discusses them as one, so will the State.

An analysis of the cases construing the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States discloses that Jackson's commitment under the circumstances of this case is neither cruel nor unusual nor, indeed, is it punishment. In the cases reviewed by counsel for the State, the Cruel and Unusual Punishment Clause has been limited in application to punishments inflicted for the conviction of a crime. See *E.g., Powell v. Texas,* 392 U.S. 514 (1968); *Robinson v. California,* 370 U.S. 660 (1962); *Louisiana v. Resweber,* 329 U.S. 459 (1947); *Weems v. United States,* 217 U.S. 349 (1910); *In Re Kemmler,* 136 U.S. 436 (1890); *Wilkerson v. Utah,* 99 U.S. 130 (1878). In *Powell v. Texas, supra,* this Court said, at pp. 531-532, that:

> ". . . The primary purpose of the clause [cruel and unusual punishment] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed." (citing authorities)

Jackson has been convicted of no crime. Jackson has not been sentenced to life imprisonment at a penal institution. A sentence is imposed as punishment for the conviction of a crime. Jackson has neither been convicted of a crime nor is he being punished. Jackson's commitment even if regarded as permanent, differs not in the slightest from any involuntary commitment. Even though involuntary, such a commitment is not a sentence, punishment or imprisonment. As Justice Douglas noted in his concurring opinion in *Robinson v. California, supra,* at pp. 668-679, ". . . [c]ruel and unusual punishment results not from confinement, but from convicting the addict of a crime . . ." at p. 676. Jackson has been convicted of no crime. Hence, Jackson's commitment cannot be regarded as punishment within the meaning of the Clause.

Similarly, even if by some stretch of the imagination Jackson's commitment could be regarded as punishment, it cannot be regarded as cruel within the meaning of the clause.

> ". . . Punishments are cruel when they involve torture or a lingering death . . . [i]t implies . . . something inhuman and barbarous, something more than the mere extinguishment of life." *In Re Kemmler,* 136 U.S. at p. 447.

Jackson's proposition that he was committed to the Department of Mental Health in violation of the Cruel and

Unusual Punishment Clause of the Eighth Amendment is without authority and in the final analysis contrary to the established authority. Jackson's commitment is neither punishment nor cruel and unusual. *Greenwood v. United States,* 350 U.S. 366 (1956), (by implication). *Nason v. Superintendent of Bridgewater Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968). *Contra, United States ex rel. von Wolfersdorf v. Johnston,* 317 F.Supp. 66 (S.D.N.Y. 1970); *United States v. Jackson,* 306 F.Supp. 4 (N.D. Calif. 1969). However, in both *Wolfersdorf* and *Jackson,* the district court erroneously adopted an expansive meaning of *Robinson v. California, supra,* which this Court expressly rejected in *Powell v. Texas,* 392 U.S. 514, 532-534 (1968), a matter both district courts ignored.

Jackson's argument that his commitment is in violation of the Due Process Clause of the Fourteenth Amendment is unclear. The Eighth Amendment only applies to the States through the Due Process Clause of the Fourteenth Amendment.

If Jackson's argument based on the Due Process Clause of the Fourteenth Amendment is taken to mean the Eighth Amendment as applied to the States through the Fourteenth Amendment, then, in addressing itself to Jackson's Eighth Amendment argument, the State has addressed itself to Jackson's due process argument as well. If, on the other hand, Jackson is taken as raising separately an argument based on the Due Process Clause of the Fourteenth Amendment, then the State must, and of consequence does, address itself to that argument. Having qualified itself, the State must now say that it is at somewhat of a loss to ascertain how it is that the Due Process Clause of the Fourteenth Amendment, standing alone, is violated by Jackson's commitment.

The Due Process Clause of the Fourteenth Amendment requires that notice, hearing, review and the commitment itself be in accordance with the precepts of law. The proceedings and commitment itself *were in accordance with the precepts of law.* Jackson was committed under Burns 9-1706a, which is similar to federal law 18 U.S.C. §§ 4242-4248, providing for commitment under similar circumstances. A hearing was held in a state court of competent jurisdiction at which Jackson was present, assisted by counsel and at which both Jackson and the State called witnesses. After a full hearing, Jackson was committed. That commitment was reviewed by the Indiana Supreme Court. Jackson cites no authority for his proposition that his commitment was in violation of the Due Process Clause of the Fourteenth Amendment. There is no showing that Jackson's commitment was in violation of the Due Process Clause of the Fourteenth Amendment. The cases of *Greenwood v. United States,* 350 U.S. 366 (1956); (by implication) *Greenwood v. United States,* 219 F.2d 376 (8th Cir. 1955) (Fifth Amendment Due Process Clause); *Frye v. Settle,* 168 F.Supp. 7 (W.D. Mo. 1958); and *Nason v. Superintendent of Bridgewater Hospital, supra,* support the State's position that Jackson's commitment is not in violation of the Due Process Clause of the Fourteenth Amendment. *Contra, United States ex rel Wolfersdorf v. Johnston, supra.*

According to Jackson, the State must dismiss the pending robbery charged because he was insane (without criminal responsibility) at the time of the commission of the robberies and because he is permanently incompetent to stand trial or violate his due process rights. Clearly, Jackson's incompetency does not bar the State from charging robbery, even though no further proceedings may be had. *Frye v. Settle* 368 F.Supp. 7, 14; 38 C.J.S., Grand

Juries. § 34, p. 1027. Furthermore, Jackson's incompetency does not defeat the State's power to make the initial commitment. *Greenwood v. United States,* 350 U.S. 366, 375; *Royal v. United States,* 274 F.2d 346 (10th Cir. 1960); *Greenwood v. United States,* 219 F.2d 376, 386 (8th Cir. 1955); *Barfield v. Settle,* 209 F.Supp. 143 (W.D. Mo. 1962). Whether Jackson was competent to stand trial bears no relation to Jackson's criminal responsibility at the time of the offenses with which he is charged. *Harrison v. Settle,* 151 F.Supp. 372 (W.D. Mo. 1957). In any event, the record in this case pertains to Jackson's competence on December 26, 1968, the day of the competency hearing only and neither supports nor refutes Jackson's contention that he lacked the capacity to formulate the criminal intent to commit the offenses with which he is charged. That is an entirely separate question, the answer to which can be determined only when Jackson becomes competent to stand trial. The State has properly obtained jurisdiction of Jackson and properly committed him. But if the State were to try Jackson at this time on the charges of robbery pending against him, the State would assuredly violate Jackson's due process rights. The Due Process Clause of the Fourteenth Amendment absolutely bars the State from trying Jackson so long as he is incompetent to assist in his defense. *Forthofer v. Swope,* 103 F.2d 707, 709 (9th Cir. 1939); *Youtsey v. United States,* 97 Fed. 937, 940-941 (6th Cir. 1899); *Frye v. Settle,* 168 F.Supp. 7, 14-15 (W.D. Mo. 1958); See also, 108 U.Pa. L. Rev. 833, 834 (1966), *supra.*

Jackson's proposed remedy is that the Federal Constitution demands that the robbery charges be dismissed. Jackson proposes a drastic remedy for which he offers neither logic nor authority. Society has an absolute right

to protect itself from its more violent elements. Jackson stands charged with two separate counts of robbery, a crime of violence against the person and hence society. Jackson was arrested and brought before the Marion Criminal Court. Jackson has never challenged the jurisdiction of Marion Criminal Court. Presumably then Jackson is being held lawfully to answer those charges. The duty to protect society devolves upon the State. In this case, the State Lawfully obtained custody of Jackson. Does Jackson's mental condition over-ride the State's duty to protect society? Can Jackson's present mental condition justify a permanent bar to prosecution by the State? The State submits that its role as *parens patriae* in relation to its citizens at large, Jackson's alleged victims and Jackson himself fully justifies the course taken by the State in this case. See, *Lynch v. Overholser,* 369 U.S. 705, 724 (1962) (Clark, J. dissenting); *Greenwood v. United States,* 219 F.2d 376, 387 (8th Cir. 1955); *United States v. Barnes,* 175 F.Supp. 60 (S.D. Calif. 1959); *Jackson v. State,* __ Ind. __ 255, N.E.2d 515, 518 (1970); *Nason v. Superintendent of Bridgewater Hospital, supra,* 233 N.E.2d, at pp. 913-914.

The remedy proposed by Jackson poses legal contradictions. What if this Court orders the robbery charges dismissed and Jackson subsequently obtains sufficient comprehension to assist in his defense? In that event, Jackson's present incompetency to stand trial would have served to absolve him of all criminal responsibility for the acts of robbery themselves, even though there had been no trial on the merits to determine whether Jackson committed the acts charged and if so whether he was criminally responsible at that time. On this record, it cannot be said that even if Jackson committed the acts charged, he was not criminally responsible. The record clearly shows that

Jackson knows the basic differences between right and wrong, the basis of criminal responsibility in Indiana. (A. 16, 20). Yet, the Due Process Clause bars the State from trying Jackson on those charges because he is incompetent to assist in his defense.

Other questions would arise if this Court ordered dismissal of the charges with leave for the State to obtain commitment under some other statute. What if the State could not obtain Jackson's commitment by some other means? Must the State then unconditionally release Jackson? For instance, Jackson claims that the State should have committed him under Burns § 22-1907. However, for the reasons set out later under the equal protection question discussed by the State, the State seriously questions whether Jackson could be committed under Burns § 22-1907. In any event, even if Jackson could be committed under Burns § 22-1907, the commitment would be a useless act. A commitment under Burns § 22-1907 would be to the Department of Mental Health which by its Commissioner would assign Jackson to an appropriate institution. Yet this is the precise commitment enjoyed by Jackson at this very time (This point is discussed fully in the next section of this Brief under the equal protection question). See *Jackson v. State*, __ Ind. __ 255 N.E.2d 515 (1970).

Perhaps the gravest difficulty posed by Jackson's proposed remedy is that it calls for some sort of Federal Constitutional standard of criminal responsibility. Any remedy afforded Jackson by this Court requires that some mental condition standard be devised and applied to Jackson. Yet this Court in no uncertain terms has positively eschewed the establishment of a Federal Constitutional standard of criminal responsibility. See *Powell v. Texas*, 392 U.S. 514, 534-537, 540-546 (1968).

This Court, other lower federal courts, and at least one other state court have upheld similar commitments, such as Jackson's, under similar circumstances. See *Greenwood v. United States,* 350 U.S. 366 (1956), *affirming* 219 F.2d 376 (8th Cir. 1955); *Royal v. United States,* 274 F.2d 346 (10th Cir. 1960); *Tyler v. Harris,* 226 F.Supp. 852 (W.D. Mo. 1964); *Barfield v. Settle,* 209 F.Supp. 143 (W.D. Mo. 1962); *Carman v. Settle,* 209 F.Supp. 64 (W.D. Mo. 1962); *Pavlick v. Settle,* 203 F.Supp. 42 (W.D. Mo. 1962); *United States v. Barnes,* 175 F.Supp. 60 (S.D. Calif. 1959); *Nason v. Superintendent of Bridgewater Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968); *Contra, United States ex rel. von Wolfersdorf v. Johnston,* 317 F.Supp. 66 (S.D.N.Y. 1970); *Maurietta v. Ciccone,* 305 F.Supp. 775 (W.D. Mo. 1969). This Court should also uphold Jackson's commitment.

B) Jackson's Commitment Under The Circumstances of This Case Does Not Constitute A Violation of the Equal Protection Clause of the Fourteenth Amendment to The Constitution of the United States.

Jackson complains that his commitment constitutes a violation of the equal protection of the laws. The basis of his argument is that he is permanently incompetent to stand trial. The basis of that incompetency is his inability to communicate with counsel for the purpose of assisting in his defense (A. 14), a skill Jackson claims he can never achieve. Jackson goes on to claim that he is feeble-minded and that he should have been committed under Burns § 22-1907 providing for the commitment of the feeble-minded. Jackson claims that commitment under Burns § 9-1706a is for life but implies that commitment

under Burns § 22-1907 is not. The reason for this, argues Jackson, is that the provisions for discharge from commitments under Burns § 9-1706a and Burns § 22-1907 differ substantially. Furthermore, Jackson claims that had he been committed under Burns § 22-1907 he would have been entitled to furloughs while committed and eventual discharge under Burns § 22-1814. The responses to Jackson's claims are several.

First of all, can it be said at this time on this record that Jackson is permanently incompetent to stand trial on the robbery charges? The State submits not. As pointed out earlier in this Brief, a conclusion that Jackson is permanently incompetent to stand trial is at best tenuous and at worst manifest speculation. Psychiatry has not as yet achieved such a level of exactitude that it can be said on this record that Jackson is permanently incompetent. Absent Jackson's basic premise that he is permanently incompetent to stand trial, the entire edifice of his argument must fall.

Jackson clings to the notion that he is feeble-minded within the meaning of Burns § 22-1907 and hence should have been committed under that statute. The State submits that on this record it is highly questionable whether Jackson could have been committed under the provisions of Burns § 22-1907. A condition of commitment under Burns § 22-1907 is that the party to be committed is ". . . feeble-minded and is not insane. . . ." Significantly, although there was testimony at Jackson's competency hearing that he was feeble-minded (A. 15), Jackson was in fact found by the committing court to be insane within the meaning of Burns § 9-1706a. (A. 7) Doctor Schuster also testified that Jackson was insane. (A. 15). Burns § 9-1706a speaks in terms of "sane", "insane",

"sanity" and "insanity" and provides that " . . . the trial shall be delayed or continued on a ground of the alleged insanity of the defendant. . . ." Insanity within the meaning of Burns § 9-1706a means a lack of ". . . comprehension sufficient to understand the proceedings and make his defense. . . ." The record fully supports a conclusion that Jackson lacked sufficient comprehension to understand the proceedings and make his defense within the meaning of the statute. The Marion Criminal Court committed Jackson ". . . until such time that the Division of Mental Health shall certify to this Court that the defendant is *sane.*" (A. 7). Accordingly, Jackson has been duly adjudicated insane within the meaning of Burns § 9-1706a by the courts of Indiana. The State submits that the word "insane" as it appears in Burns § 9-1706a and Burns § 22-1907 means the same thing. Thus, since Jackson was committed under Burns § 9-1706a as insane he could not have been committed under Burns § 22-1907 as feeble-minded because commitment under Burns § 22-1907 is limited to those who are not "insane".

Even if Jackson could hurdle the adjudication of insanity under Burns § 9-1706a, seemingly barring a commitment under Burns § 22-1907 for those who are *insane,* this record is absolutely barren of evidence to support Jackson's hypothesis that he *could have been or could be* committed now to the Department of Mental Health under Burns § 22-1907. In addition barring the commitment of the feeble-minded who are insane, Burns § 22-1907 also bars the commitment of the feeble-minded who are epileptic or who are not free from infectious or contagious diseases or vermin. There is nothing in this record to show that Jackson is not epileptic or free from infectious or contagious diseases or vermin. Hence, this record does not

support Jackson's position that he could have been or could be committed now under the provisions of Burns § 22-1907.

Assuming *arguendo* Jackson was eligible for commitment under Burns § 22-1907 as well as Burns § 9-1706a, Jackson claims that the State had a duty to obtain his commitment under Burns § 22-1907 and that there are substantial differences between proceedings under Burns § 22-1907 and Burns § 9-1706a constituting a violation of the Equal Protection Clause. Parenthetically, Jackson mischaracterizes Burns § 9-1706a as a criminal commitment proceeding and Burns § 22-1907 as a civil commitment proceeding. This is a myth which the State will dispel shortly. Turning first to a comparison of the commitment procedures under the two statutes, the State submits that an equal protection question is not raised.

Before embarking on a comparison of the statutory provisions explicitly put into issue by Jackson, it must be pointed out that there are other statutory provisions affecting the commitments, transfers, privileges and discharges of those committed under the authority of Burns § 22-1907. The laws concerning commitments to state psychiatric hospitals in Indiana have been enacted on a piecemeal basis. New laws have been enacted without regard to their affect on old laws. The result is a mass of legislation which is duplicative, overlapping, supplementary, or complementary or which sometimes supercedes or repeals by implication earlier legislation. The Indiana Appellate and Supreme Courts have not been called upon to reconcile this mass of legislation. Hence, it remains unreconciled. Accordingly, in this Brief, the State will address its arguments to the statutory provisions cited and relied upon by Jackson, merely noting that there are other

statutory provisions applying to the same subject matter. For instance, Burns §§ 22-301 et seq. affects transfer among State institutions and Burns §§ 22-1201 et seq. affect commitments and discharges under Burns §§ 22-1907 and Burns § 22-1814. It is the State's position that the additional legislation affecting Jackson's Burns § 22-1907 arguments is duplicative and does not affect the State's arguments in this case.

An examination of the commitment procedures provided by Burns § 9-1706a and Burns § 22-1907 discloses that the procedure for commitment under either is substantially the same. Under either statute, an individual's mental condition may be brought to the attention of a court of competent jurisdiction. Under either statute, the hearing court must appoint two "physicians" who are ordered to examine the person whose mental condition is in question. Under either statute, the hearing court must conduct a hearing at which the person to be committed may appear personally and by counsel. If after hearing, the hearing court determines that the mental condition of the party before it justifies it, the hearing court may order that party committed to the Department of Mental Health. Under either statute, the hearing court's determination is subject to review in the appellate courts of the State. Hence, the commitment procedure under either statute is substantially the same. For other provisions affecting the commitment procedure under Burns § 22-1907, see Burns §§ 22-1201 *et seq.* and Burns §§ 22-1301 *et seq.* providing for substantially the same procedure.

Secondly, a comparison of the discharge provisions of the two statutes does not disclose an equal protection violation. Burns § 9-1706a provides for discharge on the following conditions:

> ". . . Whenever the defendant shall become sane the superintendent of the State psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. . . ."

On the other hand, had Jackson been committed under the provisions of Burns § 22-1907, he would be entitled to discharge from the Indiana Department of Mental Health in accordance with the provisions of Burns § 22-1814, which provides that:

> "Any person may be discharged from the colony at any time by the board of trustees (commissioner of mental health), provided only that no person shall be discharged from the said colony until, in the judgment of the superintendent, the mental and physical condition of the patient justifies it."

For other provisions affecting discharge under Burns § 22-1907, see Burns §§ 22-1306 to 22-1310. The standard for discharge under Burns § 9-1706a is that the committed person has become sane (". . . comprehension sufficient to understand proceedings and make his defense. . ."). The standard for discharge under Burns § 22-1907 is that the mental and physical condition of the patient justifies it. Under either statute, discharge from the Department of Mental Health is had upon the certification of the superintendent of the hospital in which the committed person is confined.

This Court is called upon to construe the meaning and affect of these two statutory provisions of the State of Indiana as applied to Jackson. Neither the Indiana Appellate nor Supreme Court have construed the discharge pro-

visions of these two statutes. In the past, decisions of this Court have required that the state courts first be given an opportunity to construe their own statutes constitutionally. *Fornaris v. Ridge Tool Co.,* U.S., 91 S.Ct. 156 (1970), citing *England v. Medical Examiners,* 375 U.S. 411, 420 (1964). Inasmuch as this case is now before this Court for review on the merits, it is this Court that must construe the discharge provisions under these statutes. If there is any way to construe the discharge provisions of these statutes constitutionally as applied to Jackson, it must be done. *Lynch v. Overholser,* 369 U.S. 705, 710-711 (1962).

The equal protection question as applied to Jackson on this record is whether the standard for discharge under Burns § 22-1907 is a lesser standard than that of Burns § 9-1706a. Having stated the question so, the State is immediately struck with the thought that the question presupposes that there exists a continuous range of mental conditions from a lower level, by degrees, to a higher level, that the statutory provisions involved here define some mental condition conveniently found on that range and that the position of Jackson on that range may be conveniently determined. The State submits that that presupposition has little foundation in fact. The type, degree and affect of a mental disease on an individual differs from case to case. Hence, few generalizations may be made. Each individual must be taken singly. Be that as it may, the State believes that the statutory discharge provisions involved here may be construed constitutionally. Turning to the statutory discharge provisions, the State submits that the standard for discharge under either statute encompasses a class of mental conditions and that the classes overlap conceptually. The classes are not mutually exclusive, but have some mental conditions in common, that is to say, there are some mental conditions common to both.

If Jackson's position in his Brief be accepted by this Court, then Jackson could have been committed under either statute. Jackson claims that he is feeble-minded and should have been committed under Burns § 22-1907. Dr. Schuster testified at Jackson's competency hearing that he was feeble-minded. (A. 15). On the other hand, the record clearly shows that Jackson was properly committed under Burns § 9-1706a as insane. Dr. Schuster also testified that Jackson was insane. (A. 15). The basis of Jackson's position is that his mental condition, whatever that be, will never improve. If that position be accepted by this Court, then it is only reasonable to conclude that Jackson could never be discharged under the provisions of either statute. For discharge under Burns § 9-1706a, Jackson must achieve sufficient communicative skills to assist in his defense. (A. 14). If, as Jackson argues, his condition will never improve, then he can never achieve sufficient communicative skills to obtain a discharge under Burns § 9-1706a. Similarly, if Jackson could be committed properly under Burns § 22-1907 and if his condition will never improve, then he can never obtain discharge under Burns § 22-1814, the discharge provision for commitment under Burns § 22-1907. Burns § 22-1907 is an involuntary commitment. If the condition of a person at the time of his commitment justifies a commitment under Burns § 22-1907 then, to be entitled to discharge under Burns § 22-1814, his condition must change or improve. But the very basis of Jackson's position is that his condition will never change or improve, Thus, by Jackson's own argument, he can never be entitled to discharge under Burns § 22-1814. If so, then Jackson can never obtain discharge under the provision of either statute. If, on the other hand, this court rejects Jackson's position that his condition will never change or improve then, if Jackson could obtain discharge under

Burns § 22-1814, he could as well obtain discharge under Burns § 9-1706a. To say that Jackson's mental condition could or could not, change or improve sufficiently to obtain a release under Burns § 22-1814 is manifest speculation and not a conclusion supported by the record in this case.

A comparative analysis of the discharge provisions under Burns § 9-1706a and Burns § 22-1907 discloses other considerations bearing on Jacksons equal protection question. Significantly, a discharge from a commitment made under Burns § 22-1907 is very limited indeed and does not amount to an unconditional discharge. See Burns §§ 22-1901 to 22-1913. Although Burns § 22-1814 provides for discharge, the affect of that discharge is somewhat limited by the provisions of Burns § 22-1910. Under Burns § 22-1910 an individual once adjudicated feeble-minded though discharged, may be recommitted upon no more than a reputable physician's sworn statement that the individual was a former patient and should be recommitted to the Department of Mental Health. See Burns § 22-1910; See also Burns § 22-1311. In view of the statutory scheme for the commitment, discharge, and recommitment of those adjudged feeble minded under Burns § 22-1907, had Jackson been committed as feeble-minded, his commitment would have been permanent with considerably less safeguards than presently afforded him under Burns § 9-1706a, the statute under which Jackson was actually committed. As a matter of fact, a commitment under Burns § 22-1907 could raise grave constitutional questions.

Another factor alleged by Jackson to give rise to a denial of the equal protection of the laws an allegation by Jackson that had he been committed under Burns § 22-1907, he would have been eligible for furloughs while confined and implies that no such opportunities are available to

one committed under Burns § 9-1706a. The authority for the proposition that those committed as feeble-minded may obtain furloughs while confined is Burns § 22-1908. See also Burns § 22-1307 (leave of absence). The statute expressly provides that ". . . [f]urloughs and discharges may be given to the patients as provided by such regulations." Jackson's argument that because he was committed under Burns § 9-1706a, and cannot be furloughed, his right to the equal protection of the laws has been violated, is without merit. Jackson's argument in this regard is a factually and conceptually mistaken. The furlough provision of Burns § 22-1908 is a privilege available to those committed to the Muscatatuck State Hospital and Training Center. See Burns § 22-1901. Each psychiatric hospital in the State of Indiana under the control of the State has been created and established under the authority of laws enacted by the legislature expressly authorizing the creation and establishment of a specific institution. Thus, for instance, Muscatatuck was created and established under the authority of Burns §§ 22-1801 to 22-1815, parts of which have since been superseded by Burns §§ 22-1901 to 22-1913. The furlough provision to which Jackson refers applies only to those confined at Muscatatuck. The statute under which one is committed has absolutely nothing to do with the privileges to which a confined individual might be entitled. Furthermore, commitment under either statute is to the Department of Mental Health. *Jackson v. State*, __ Ind. __ 255 N. 2d 515 (1970) Jackson was in fact committed to the Department of Mental Health. (A. 7). Transfer among state psychiatric institutions is solely administrative. *Jackson v. State, supra.* The Indiana law on the subject specifically provides that the Commissioner of the Department of Mental Health has the power, at his discretion ". . . [t]o transfer psychiatric patients in state

hospitals and institutions for the care of such patients from one hospital or institution to another. . . ." Burns § 22-5032(6). For other provisions affecting transfer, see Burns §§ 22-301 *et seq.* Further augmenting the discretionary authority of a Commissioner of the Department of Mental Health to transfer patients from one psychiatric institution to another is Burns § 22-1907, itself, which expressly provides that the Commissioner of the Department of Mental Health "... may authorize transfer such application from the institution to which the person is committed to any other institution, if there shall be no room therein. . ." The point is that even though committed under Burns § 9-1706a, Jackson could have been, or may even be confined presently, at Mascatatuck. *Jackson v. State supra.* If he is, or were to be, the State knows of no bar preventing Jackson from obtaining a furlough while at Mascatatuck. On the other hand, even if Jackson had been committed, under Burns § 22-1907, to the Department of Mental Health, he could have been transferred to some other State psychiatric institution, in which event he would not be entitled to the furlough privilege of Burns § 22-1908.

Taking the matter from a different view, Jackson claims that if committed under Burns § 22-1907 he would possibly be eligible for furloughs from the hospital and would be eligible for discharge from the hospital when "in the judgment of the superintendent, the mental and physical condition of the patient justifies it," but that having been committed under Burns § 9-1706a he will never be eligible for furlough and will not be eligible for discharge until he can communicate with his lawyers and participate in his own defense. Jackson understandably makes no attempt to describe the specific conditions under which he would

be furloughed or discharged, but instead leaves those conditions to the imagination of the Court. Surely the Court can not imagine the superintendent discharging Jackson from the hospital without first having formed some basis of communication with him. If Jackson can communicate with the Superintendent either directly or through an intermediary, then he can communicate with his lawyer either directly or through an intermediary. If he can learn the former he can learn the latter. Under either statute the prerequisite to discharge is the same, the development of some ability to communicate.

It should be noted that the difference between the phrases "prerequisite to discharge" and "standard for discharge" is significant. Under a Burns § 22-1907 commitment the superintendent may develop a means of communication with Jackson and still determine for other reasons, that he should not be released. Under Burns § 9-1706a the development of a means of communication with Jackson would automatically cause his discharge from the mental institution, though he might subsequently be confined to a penal institution if, and only if, a jury should determine both that he committed the acts with which he is charged and that he was legally sane at the time he did so.

In short, if Jackson's contention that he would never become competent to stand trial is true, then his commitment is for life under either statute. If, however, Jackson's contention is not true, then only a commitment under Burns § 9-1706a will guarantee his release from the Department of Mental Health as soon as he gains sufficient competence.

Jackson's sole authority for the proposition that the commitment in this cause is in derogation of the Equal

Protection Clause are the cases of *Nason v. Superintendent of Bridgwater Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968) and *People ex rel. Myers v. Briggs,* 46 Ill.2d 281, 263 N.E.2d 109 (1970). Neither case affords Jackson any solace. Nason alleged *inter alia* that his indefinite confinement to a hospital for the mentally ill because incompetent to stand trial was a denial of the equal protection of the laws in that the hospital in which he was committed fell substantially below the medical standards of other state hospitals. 233 N.E.2d at p. 909. Noting certain inadequacies in the medical treatment afforded Nason, the court held no more than that ". . . if adequate treatment for Nason is not provided there within a reasonably time, the legality of his further confinement may be presented to the county court." 233 N.E.2d at p. 914. Significantly, the court in *Nason* expressly noted that it could ". . . perceive no denial to Nason of any constitutional right merely because of his confinement . . ." so long as he was afforded adequate treatment. 233 N.E.2d, at p. 913. *Nason* was decided solely on the basis of the treatment afforded Nason and a comparative analysis of the medical standards among the state institutions. No such questions are presented in this case.

The *Briggs* case does no more than illustrate the resolution of a factually similar matter by the courts of Illinois. The basis for the Illinois Supreme Court's disposition is unclear. The case does not appear to have been decided on the basis of constitutional considerations. The primary authority for the court's disposition was the *English* case of *Regina v. Roberts,* 2 All England Reports 340 (1953). Significantly, Lang was not ordered released. What the court did order was that Lang be arraigned and tried on the charges pending against him. The State submits that this case represents no more

than one jurisdiction's disposition of a similar matter. It is not a disposition required by the Constitution of the United States. Furthermore, the Illinois resolution of the matter may, in and of itself, create grave constitutional problems. For instance, what if Lang should be convicted on trial? May he then be imprisoned? Or must the State hospitalize Lang and await his recovery for the purposes of re-trying him?

Although commitment in Indiana to psychiatric institutions are triggered under different statutes and for different reasons, all commitments are to the Indiana Department of Mental Health. *Jackson v. State, supra;* Burns § 9-1706a; Burns § 22-1907. As to the institution in which a committed party is sent, that is entirely within the discretion of the Commissioner of the Department of Mental Health. And even though the Commissioner may initially place a committed individual in one institution or another, the Commissioner is authorized by statute to transfer from one institution to another within his discretion. *Jackson v. State, supra;* Burns § 22-1907; Burns § 22-5032(6). Significantly, Jackson's commitment is not to an institution within the control of the Department of Corrections. For all practical purposes, there is no civil or criminal commitment in Indiana. Jackson's contentions that his commitment is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is without merit.

CONCLUSION

The question regarding Jackson's commitment cannot be whether it is the best possible solution for a thorny issue, but rather, the question must be whether the Federal Constitution proscribes the Indiana's solution for Jackson.

McGautha v. California, U.S., 91 S.Ct. 1454, 1461, 1476-1477 (1971). The State submits that the Federal Constitution does not bar the Indiana solution for Jackson. Therefore, the decision of the Indiana Supreme Court being reviewed here should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 70-5009

THEON JACKSON,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE COUNCIL FOR EXCEPTIONAL CHILDREN, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AND THE NATIONAL ASSOCIATION FOR RETARDED CHILDREN AS AMICI CURIAE

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It is hereby respectfully moved pursuant to Rule 42 of the Rules of this Court that the above named *amici curiae* be granted leave to file the accompanying brief on the merits.

The lateness of this submission is due to the fact that *amici* have only recently been notified of the pendency of this litigation. Consent to such filing has been requested and has been granted on behalf of petitioner, but denied on behalf of respondent, the State of Indiana. A draft of the brief of *amici* attached hereto was sent to respondent and petitioner on August 25, 1971.

The interest of *amici curiae,* as stated in the accompanying brief, is as follows:

The American Association on Mental Deficiency has, since its founding in 1876, been engaged in efforts to improve the society's treatment of the mentally deficient. To this end, the Association has published widely accepted standards for terminology and classification of the mentally deficient. Additionally, the Association has undertaken a wide range of activities to improve the status and treatment of the mentally deficient. The Association has a current membership of approximately 10,000, who are generally active in all phases of care and treatment of the mentally deficient.

The Council for Exceptional Children was founded in 1922. Its primary concern has been to assure education and appropriate treatment by society of the handicapped, including those with language and intellectual deficiencies, regardless of chronological age. For the past five years, the Council has conducted extensive research on state laws and state programs relating to the handicapped. It also publishes numerous journals and books regarding the handicapped. The Council has 40,000 members including educators, psychologists, researchers, and others directly concerned with the problems of the handicapped.

The American Orthopsychiatric Association is an organization concerned with the problems of mental deficiency, mental disorder and abnormal behavior. The Association has a membership of approximately 3,500, composed of psychiatrists, psychologists, psychiatric social workers, and persons drawn from the related fields of anthropology, sociology, education, and allied professions. The Association seeks to coordinate and integrate the activities of specialists who are concerned with normal and abnormal behavior. The Association has as one of its objectives the fostering of research. The Association publishes a learned journal, *The American Journal of Orthopsychiatry*, now in its thirty-seventh year of publication. Its last annual meeting was attended by more than 10,000. The American Orthopsychiatric Association has a long-standing interest in the medical and civil rights of the mentally ill and the mentally deficient.

The National Association for Retarded Children is a voluntary organization devoted solely to promoting the welfare of America's over six million retarded citizens. The Association is represented in all fifty states by approximately 1,500 state and local member units comprised of over 225,000 members. Its membership includes parents of retarded children, professional persons including physicians, teachers, psychologists, social workers and clergymen, and other persons interested in mental retardation. Some of the Association's major activities include the promotion of the general welfare of mentally retarded persons regardless of chronological age, the furtherance of research, the development of a better understanding of the problem of mental retardation by the general public via the dissemination of information, the initiation and development of programs and services for the mentally retarded, the furtherance of training and education of persons for work in careers relating to mental retardation, and the implementation of legislation on behalf of mentally retarded persons.

Amici curiae have a long-standing concern with laws which discriminate against the mentally ill and the mentally retarded. The automatic incarceration for an indefinite term of persons accused of crime and found incompetent to stand trial is in this category.

The instant case provides a particularly striking example of the inequities which can flow from this practice. The indeterminate sentence passed on the petitioner was without any finding that he was a danger to himself or others, that he had committed a crime, or that he could ever be made competent to stand trial.

Amici curiae have an interest in these matters which transcends the particulars of this case. These organizations, dedicated to the protection of the civil and human rights of the mentally ill and the mentally deficient, believe that such practices as are evidenced in petitioner's case unconstitutionally deprive the mentally ill and the mentally deficient of the equal protection of the laws, the right to bail, and

the right to a speedy trial. The rights of the many million mentally ill and mentally deficient persons within the United States, though particularly susceptible to abuse, are no less precious than the rights of any other group. *Amici* believe that the rights of this entire class of persons must be protected. In view of this broad interest, our perspective differs from that of petitioner, and we believe that a separate expression of views is warranted.

Respectfully submitted,

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BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE COUNCIL FOR EXCEPTIONAL CHILDREN, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AND THE NATIONAL ASSOCIATION FOR RETARDED CHILDREN AS AMICI CURIAE

QUESTIONS DISCUSSED BY AMICI

Whether the automatic commitment for an indefinite term of criminal defendants found to be incompetent and unlikely to be restored to competence within a reasonably short period of time, without traditional civil commitment safeguards, deprives them of (a) the equal protection of the laws, (b) the right to bail, and (c) the right to a speedy trial.

INTEREST OF AMICI CURIAE

The American Association on Mental Deficiency has, since its founding in 1876, been engaged in efforts to improve the society's treatment of the mentally deficient. To this end, the Association has published widely accepted standards for terminology and classification of the mentally deficient. Additionally, the Association has undertaken a wide range of activities to improve the status and treatment of the mentally deficient. The Association has a current membership of approximately 10,000, who are generally active in all phases of care and treatment of the mentally deficient.

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Orthopsychiatric Association has a long-standing interest in the medical and civil rights of the mentally ill and the mentally deficient.

The National Association for Retarded Children is a voluntary organization devoted solely to promoting the welfare of America's over six million retarded citizens. The Association is represented in all fifty states by approximately 1,500 state and local member units comprised of over 225,000 members. Its membership includes parents of retarded children, professional persons including physicians, teachers, psychologists, social workers and clergymen, and other persons interested in mental retardation. Some of the Association's major activities include the promotion of the general welfare of mentally retarded persons regardless of chronological age, the furtherance of research, the development of a better understanding of the problem of mental retardation by the general public via the dissemination of information, the initiation and development of programs and services for the mentally retarded, the furtherance of training and education of persons for work in careers relating to mental retardation, and the implementation of legislation on behalf of mentally retarded persons.

SUMMARY OF ARGUMENT

Petitioner is a retarded deaf-mute with a mental age of 3 or 4. He was charged with two robberies, involving nine dollars, and because of his afflictions has been indeterminately confined in a state mental hospital for almost three years, based on a court finding that he was incompetent to stand trial on the robbery charges. This compulsory hospitalization which, because of the nature of petitioner's condition will probably be for life, was accomplished under standards less rigorous, and has consequences more onerous, than the ordinary civil commitment in Indiana. This violates the petitioner's right to the equal protection of the laws and this Court's holding in *Baxstrom v. Herold*, 383 U.S. 107 (1966).

Petitioner has had no trial and there is little prospect of his being made competent for trial. Confinement violates petitioner's constitutional right to bail, for denial of bail can be justified only when it assures that petitioner will be available for trial. Since petitioner's disabilities cannot be treated successfully by the state, his confinement will probably be permanent and cannot in any way be seen as increasing the likelihood of petitioner's appearing for trial. Further, because no treatment for his incompetency is possible or available, indefinite confinement by the state due to pending criminal charges violates petitioner's constitutional right to a speedy trial.

When an accused's incompetency is not correctable within a reasonably short period of time, the state is constitutionally required to resolve the outstanding criminal charge. The state must afford the incompetent defendant, through counsel, the opportunity to present any facts or arguments which would dispose of the charges and do not require his personal participation. The state may also bring petitioner to trial if, but only if, there is a judicial finding that a fair trial is possible notwithstanding petitioner's incompetency. His incompetency should be viewed as similar to other incapacities such as amnesia, other memory losses, unavailability of witnesses, and physical disabilities which, though they may require special procedures and evidentiary rules to redress, do not become an absolute bar to trial. If a fair trial under such procedures is not possible, or if the state does not choose to proceed immediately to trial, the state must dismiss the indictment, and rely upon civil commitment proceedings if any further confinement is thought necessary.

ARGUMENT

Introduction

Amici Curiae have a long-standing concern with laws which discriminate against the mentally ill and the mentally regarded.[1] The automatic incarceration for an indefinite term of persons accused of crime and found incompetent to stand trial is in this category. The instant case provides a particularly striking example of the inequities which can flow from this practice.

Petitioner is a 27-year-old deaf-mute with a mental age of 3-4 years. He has been accused of robbing $9.00 more than four years ago. He has denied the charges and has never been brought to trial because he was found to be incompetent to assist in his own defense. For almost three years he has been confined in state mental institutions. Based on this record, it appears that he will be confined for the rest of his life, since there is virtually no chance that he can ever be made "competent."

This indeterminate sentence was passed on petitioner without any finding that he was a danger to himself or to others; that he was unable to live independently in the community; that he had committed a crime; or that he could be made competent to stand trial. *Amici* submit that this petitioner's confinement deprives him of the equal

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[1] Though it is not suggested that this difference between mental illness and mental retardation should control the disposition of this case, any confusion created by the clumsy usage of the two terms should probably be dispelled.

Mental retardation, in contrast to mental illness, is not an illness but a condition. Persons who are mentally retarded are those whose normal intellectual growth was arrested at some time before birth, during the birth process, or in the early developmental years. As there is no "cure" for mental retardation, a person so afflicted will remain so throughout his life. The effects of his incapacity can, however, be alleviated in many cases by training aimed at teaching the retarded person to perform tasks necessary for working or leading an independent life.

protection of the laws, deprives him of his right to bail, and deprives him of his right to a speedy trial.

I. PETITIONER'S INDETERMINENT COMMITMENT TO A STATE MENTAL HOSPITAL, BASED SOLELY ON THE FINDING THAT HE IS INCOMPETENT TO STAND TRIAL, DEPRIVES HIM OF EQUAL PROTECTION OF THE LAWS.

A. Petitioner Could Not Have Been Civilly Committed For Mental Hospitalization On The Instant Record Under Indiana Law.

In *Baxstrom v. Herold,* 383 U.S. 107 (1966), this Court unanimously held that transfer of a convicted criminal from prison to a mental institution, thereby converting a determinate commitment to one that lasts until he no longer "continues insane," violated the equal protection guarantee unless that transfer was carried out "in conformity with proceedings granted all others civilly committed" under state law. 383 U.S. at 110, 115, n. 2. The Court concluded that the mere fact that Baxstrom was in state custody because he had violated a criminal law did not reasonably distinguish him from anyone else for whom the state might seek civil commitment in a mental hospital. As the Court stated, in determining "whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." 383 U.S. at 111-112.

In the instant case, petitioner was in state custody because he had been charged on two counts of robbery. Before trial, petitioner was found incompetent to stand trial and was indeterminately committed to the custody of the state "Division of Mental Health to be confined until such time that the Division . . . shall certify . . . that the [petitioner] is sane." (A. p. 10). Petitioner was found "insane" on the ground that he lacked "comprehension sufficient to understand the proceedings and make his defense" (Burns

Ind. Stat. § 9-1706a) because, as the Indiana Supreme Court stated, he "was a deaf mute with a moderately severe intellectual defect," *Jackson v. State,* ____ Ind., ____, 255 N.E.2d 515, 516 (1970). The committing court found only that petitioner was incompetent to stand trial. It did not find that petitioner required either treatment or custodial care in a mental hospital to guard against harm to himself or others. For all other persons civilly committed under Indiana state law, such findings are required.

Sections 22-1209 and 22-1201 (1) of the Burns Indiana Statutes authorize commitment of a "mentally ill person . . . who is afflicted with a psychiatric disorder which substantially impairs his mental health; and, because of such psychiatric disorder, requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others of the community in which such person resides." Section 22-1807 of the Burns Indiana Statutes authorizes commitment of "feeble-minded" persons who—as that term is in effect defined by Section 22-1801—"are feeble-minded and are therefore unable to properly care for themselves."[2]

Thus, whether petitioners disabilities are considered a "psychiatric disorder" or "feeble-mindedness" for purposes of Indiana law, it is clear that if he were considered for civil commitment, additional factual determinations would be required beyond the simple determination of insufficient "comprehension to understand the proceedings to make his defense" which was the sole factual predicate of petitioner's commitment in the instant case. The state must make

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[2]Section 22-1807, establishing the power of commitment, and section 22-1801, establishing the place of commitment and limiting its purposes to "care for . . . feeble-minded . . . unable properly to care for themselves," were enacted at the same time, in 1919, as parts of a comprehensive legislative scheme. These sections must thus be read as interdependent and mutually qualifying. See also, Official Opinion No. 49, *Opinions of the Attorney General of Indiana* (September 26, 1958).

these same additional factual determinations regarding petitioner before it may commit him to indefinite mental hospitalization.

The fact that petitioner was charged with a crime does not differentiate him from those whom the State civilly commits. The state's discriminatory treatment of petitioner as compared to the civilly committed violates petitioner's right to equal protection of the laws. As this Court stated in *Baxstrom:*

> "where the state has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed . . . it may not deny this right to a person in Baxstrom's position solely on the grounds that he was nearing the expiration of a prison term. It may or may not be that Baxstrom is presently mentally ill and . . . a danger to others . . . . All others receive a judicial hearing on this issue. Equal protection demands that Baxstrom receive the same," 383 U.S. at 114-115.

On the basis of the record at petitioner's hearing below, it is clear that he could not have been civilly committed under Indiana law. First, this record could not support a finding that petitioner "requires . . . treatment [or] training" in the state facilities. (Burns Ind. Stat. § 22-1201-(1)). One of the examining psychiatrists testified that, in view of the petitioner's life-long deaf-mutism coupled with his "moderately severe mental deficiency" (A. p. 19), "I question how much ability he has, how much more he can learn, therefore the prognosis appears rather dim." (A. p. 16). In addition, Mr. John Olson, supervising teacher of the state school for the deaf, examined petitioner "on four occasions about an hour and a half or two hours each time." (A. p. 24). As the dissenting Justice on the Indiana Supreme Court characterized his testimony, he "stated he knew of no facilities in this State which could help this [petitioner.] He also stated the School for the Deaf did not accept mentally retarded persons." 255 N.E.2d at 518. No testimony controverted these propositions, that petitio-

ner was so handicapped that no training or treatment had any successful prospect, or that in any event the state had no facilities available to train or treat petitioner.

Second, this record could not support a finding that petitioner is "feeble-minded and . . . therefore unable to properly care for" himself. (Burns Ind. Stat. § 22-1801). According to petitioner's mother who testified at the competency hearing below, petitioner held employment at the time he was arrested, notwithstanding his many disabilities. She testified that "since he has been here [in Indiana] he worked at the Holiday Inn . . . helping in the kitchen . . . and he worked in Mississippi with the building construction." (A. p. 21). No testimony suggested that petitioner needed custodial care because of his inability to care for himself. Respondent's brief, p. 5, correctly suggests that there might be "grave constitutional questions" presented by petitioner's commitment as a "feeble-minded person."

Third, this record could not support a finding that petitioner required "detention in the interest of the welfare . . . of others in the community." (Burns Ind. Stat. § 22-1201 (1)). The only hint of danger to others comes from the fact that petitioner had been charged with two counts of robbery, involving a total of $9.00 (See 255 N.E.2d at 518). There is no indication of any previous criminal conduct. The pending charges were not. of course, tested because petitioner was considered incompetent to stand trial. The charges were based on affidavits by complainants which had not been independently scrutinized in any judicial proceeding. Moreover, petitioner had pleaded "not guilty" to the charges. According to the joint report which the examining psychiatrists presented to the trial court, petitioner "denied flatly any responsibility for the acts [with] which he was charged . . . ." (A. p. 8).

In short, the sole basis for petitioner's commitment for indeterminate confinement in a mental hospital under the jurisdiction of the Indiana Division of Mental Health was that he had been found incompetent to stand trial in a state

criminal proceeding. The equal protection clause as interpreted in *Baxstrom v. Herold* forbids such state action. In *Baxstrom* the court ruled that "where . . . the state has created functionally distinct institutions," a person could not be transferred from "the jurisdiction of the Department of Correction" to institutions "under the jurisdiction and control of the Department of Mental Hygiene." (383 U.S. at 113) unless the state first established that person's illness and need for confined treatment by the same substantive standards and procedures as the state applied to all others committed to institutions under control of its mental health authority.

As the United States Court of Appeals for the Second Circuit has recently stated, "*Baxstrom* . . . sparked an awareness that we cannot tolerate two classes of insane persons—criminal and non-criminal—when we are asked to examine commitment procedures available to both." *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1081 (1969). See also *Specht v. Patterson*, 386 U.S. 605 (1967) (which, as the Second Circuit characterized it in *Schuster*, "further sharpened the distinction between a finding of criminal activity and a finding of commitability by reasons of mental illness") 410 F.2d at 1083); *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968); *Cameron v. Mullen*, 387 F.2d 193 (D.C. Cir. 1967); *Shone v. State of Maine*, 406 F.2d 844 (1st Cir. 1969); *People v. Lally*, 19 N.Y.2d 27, 224 N.E 2d 87 (1966).

The benefits of forced mental health treatment are themselves doubtful, (see, *e.g.*, Katz, "The Right to Treatment: An Enchanting Legal Fiction?", 36 *U. Chi. L. Rev.* 755 (1969). But for those such as petitioner, who are forced into the mental health system solely because of their entanglement with the criminal law, the benefits of such treatment—to the person committed or to society—in practice approach the vanishing point. In particular, these persons are disadvantaged as compared to the "ordinarily" civilly committed. Professor Norval Morris has graphically made this point:

> "Prison authorities regard their inmates in the facilities for the psychologically disturbed as both criminal and insane, bad and mad; mental hospital authorities regard their inmates who have been convicted—or only arrested and charged with crime—as both insane and criminal, mad and bad. While examining records in state mental hospitals I occasionally find notations in red ink to the effect that this person has been arrested for a crime. Discussion with the relevant authorities reveals that the red ink notation seriously influences the date of his likely discharge. Note that an arrest without a conviction has this effect."

N. Morris, "Psychiatry and the Dangerous Criminal," 41 *S. Calif. L. Rev.* 514, 525 (1968).

This hybrid status—criminal and insane, "mad" and "bad,"—has worked most particularly to the disadvantage of those, like petitioners, who have been committed to mental institutions because they have been found incompetent to be tried criminally. Most states follow Indiana's practice in imposing automatic, indeterminate commitment to state mental institutions following a finding of incompetency to stand trial.[3] By this automatic conjunction of its criminal and mental health custodial powers, these states take custody of persons which they would not, and could not, jus-

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[3]See, *e.g.*, Burns Ind. Stat. § 9-1706a(2), Code of Ala. § 15-426(2), 17 Ariz. Rev. Stat. 15-250(B), Cal. Crim. Proc. Code. §§ 10-1370, 1371, Conn. Gen. Stat. § 54-40(2), Ga. Code § 27-1504, Minn. Stat. § 631.18, Mo. Stat. §§ 545.760, 545.770, Mont. Rev. Code § 95-506(b) Nev. Rev. Stat. § 178.425, N.J. Stat. §§ 2A: 163-2, 30: 4-82, N. Car. Gen. Stat. § 122-83, N. Dak. Century Code § 29-20-02, Ohio Rev. Stat. § 2945.38, Utah Code § 77-43-5, Wis. Stat. § 957.13. *Compare* Note, "Incompetency to Stand Trial," 81 *Harv. L. Rev.* 454, 461 1967); "The widespread practice of automatically committing defendants incompetent to stand trial reflects an unawareness that the policies controlling whether a trial should be delayed are distinct from those controlling whether a person should be involuntarily committed. As a result, many of the present commitments of incompetent defendants serve no legitimate interest of the state."

tify if the "criminal law" or the "mental health law" rationale stood alone. The fact that a person has been charged with a crime does not justify indeterminate confinement; rights to bail and to a speedy trial stand as safeguards against this abuse of power for the ordinary criminal defendant. See sections II.A. and II.B., *infra*. And the fact that a person lacks intellectual capacity, either by reason of mental illness or mental deficiency, is not considered sufficient basis in most states (including Indiana) for forced mental hospitalization unless that incapacity seriously endangers either the person or the community. See Burns Ind. Stat. § 22-1201(1); Note, "Civil Commitment of the Mentally Ill: Theories and Procedures," 79 *Harv. L. Rev.* 1288 (1966); Lindman & McIntyre, *The Mentally Disabled and the Law* at 17-22 and Table II-B at 49 (Amer. Bar Fdtn. 161).

A finding that a person is not competent to stand trial does not by itself demonstrate danger to that person or to the community. Trial incompetency may be relevant to the questions of need for treatment and dangerousness; it cannot rationally be considered dispositive of either question. But state laws, such as the law of Indiana, which provides automatic commitment of all found incompetent, justify indefinite mental hospitalization of an indicted criminal defendant only because he appears in some degree "mad" and in some degree "bad" though in neither case would the "madness" or the "badness" justify such commitment on its own. Respondent in *Baxstrom v. Herold* argued that because Baxstrom was a convicted criminal the state need not show his mental illness by the same rigorous standards and procedures that it applied to the non-criminal mentally ill. But the Court, as noted, held such a state-imposed intermixture of "badness" and "madness" "wholly arbitrary" as a ground for compulsory hospitalization, 383 U.S. at 114. Petitioner's "badness" is much less persuasively demonstrated than was Baxstrom's; petitioner is merely charged with a criminal offense. And petitioner's "madness" is even less apparent than Baxstrom's, who had been diagnosed as

insane by a prison physician. Whatever the strength of Baxstrom's diagnosis, it referred generally to his capacity to function in society while petitioner has been diagnosed only as mentally incapable of effectively participating in a criminal trial.

B. The State Invidiously Discriminates Between Petitioner and Those It Civilly Commits Because The Standards For Release Applied To Petitioner Are More Onerous, And His Release Is In Fact Less Likely, Than Those Civilly Committed.

It is evident that petitioner's confinement for incompetency in a mental hospital will stretch for a considerable duration. As Justice DeBruler of the Indiana Supreme Court stated in his dissent in this case, on the basis of uncontroverted testimony at the hearing below, "there was almost no chance that [petitioner] ever could improve his understanding sufficiently to be tried . . ., in effect, the commitment of [petitioner] until he can comprehend the nature of the charge and assist in his defense is a commitment for life." 255 N.E.2d at 518. If petitioner had been civilly committed as "feeble-minded" under Section 22-1807 of the Burns Ind. Stat., he would be released as soon as, in the superintendent's judgment, his "mental and physical condition . . . justifies it." See Burns Ind. Stat. § 22-1814. In sharp contrast, petitioner will not now be released until he has become competent to stand trial, even if in the meantime he should be thought ready for release. See Burns Ind. Stat. § 9-1706a.

The thrust of modern mental health theories about the care and treatment of mental retardates is to integrate them into the community and "normalize" their lives to as great a degree as possible. Thus, it is quite likely that a "moderately-severe" retarded individual like petitioner could be released into a sheltered community environment within a short time regardless of whether he would ever be able to competently assist in the conduct of his trial. See generally, President's Committee on Mental Retardation, *Chang-*

ing Patterns in Residential Services for the Mentally Retarded (Monograph, 1969); *The Problem of Mental Retardation* (U.S. Department of Health, Education and Welfare, pp. 10-11).

Generally, forced mental hospitalization tends to last longer for those found incompetent to stand trial as compared to those committed by ordinary civil processes.[4] From the hospital authorities' perspective, the escape of an inmate committed with pending criminal charges appears likely to be regarded by the community with more terror than escape by those only "mad" and not also "bad." Thus, hospitalization in maximum security is more likely for committed incompetents as a group than for ordinary civil commitments as a group.[5] Moreover, home or community leave for committed incompetents is sharply restricted either by hospital officials' special fears or by statutory command in some states.[6] These special custodial

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[4] *Compare* New York practice, described as follows: "While civil state hospital patients are released into the community, Department of Correction patients are generally not so released. Matteawan and Dannemora [Department of Correction mental hospitals] patients, upon release from confinement in those institutions, are returned to courts for trial, returned to penal institutions or are transferred to civil state hospitals. One would expect under these circumstances that doctors would be more willing to release patients, and that, as a consequence, patient movement from Department of Correction mental hospitals would be more fluid than from Department of Mental Hygiene mental hospitals; the opposite is clearly true." G. Morris, "The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York." 17 *Buffalo L. Rev.* 651, 657 (1968).

[5] "[T]he central problem in 'restoration to competency' is that relatively few persons committed for incompetency are returned for trial. Most of them spend long intervals in the maximum security institution, some of them there virtually for life." Matthews, A.R., *Mental Disability and the Law* at 138 (Amer. Bar Foundation 1970).

[6] "As the interval after commitment lengthens . . . [t]he hospital officials are made aware that security hospitalization ceases being a prelude to conviction and becomes a substitute for it. If an inmate

restrictions on the hospital status of committed incompetents impede the possibility of treatment toward regained mental health.

In a careful study of committed incompetents in Massachusetts, Dr. Louis McGarry concluded that the "net effect . . . of an indefinite pretrial commitment weighs in the direction of obstructing rehabilitation and the return of the individual to society." "Competency for Trial and Due Process Via the State Hospital," 122 *Am. J. Psychiat.* 623, 626 (1965). Drs. McGarry and Bendt also compared a matched group of men committed for incompetence to stand trial and men who, though indicted for alleged crimes, had been civilly committed following dismissal of their indictments. McGarry found the average length of hospitalization for the

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is discharged who can no longer be tried but who may be dangerous, the hospitals know they will be held accountable if he commits another crime.

"As a consequence of these constraints, the hospitals as a defensive measure have turned to restrictive release policies in order to minimize the risks of mistakes in judgment. Aside from the law's requirements regarding release, there are few counter pressures on these policies. The inmate's contacts with friends and relatives are few and become fewer with time. Many were not represented by counsel or have ceased to be regarded as active cases by the counsel who did represent them. Institutional crowding, a great practical influence favoring release from mental hospitals generally, seems not to be a major factor in incompetency cases, perhaps because the number of these cases is a relatively small fraction of hospital population.

"When the interval of security hospitalization is long extended—several years or a decade—an additional problem arises. No one back in the 'home' locality is interested in the case. Except for especially notorious crimes, public officials and general public have forgotten about it and witnesses and victims would as soon not revive its memory. State hospital officials report that in some instances a year may go by before anyone from the originating court or prosecutor office will even answer mail on the matter. This lack of interest shifts entire responsibility for the release decision to the hospital. Exercise of the responsibility will, however, be 'reviewed' if the released person should commit an offense after the hospital has let him go." Matthews, *op. cit. supra*, at 139-40.

criminally incompetents was 61 months, while the average hospitalization for the comparable group of civilly committed was only 5.8 months. He concludes that "with respect to the length of hospitalization, our hypothesis of the negative effect of commitment in a criminal status is strikingly borne out . . .," McGarry and Bendt, "Criminal vs. Civil Commitment of Psychotic Offenders: A Seven-Year Follow-Up," 125 *Am. J. Psychiat.* 1387, 1391 (1969). As the Court of Appeals for the Second Circuit has found, in a related context, "the facts reveal that there always lurks the grisly possibility that a prisoner placed in [a state mental hospital for the 'criminally insane'] will be marooned and forsaken." *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1079 (1969). It is for just such practical as well as theoretical reasons that pretrial commitment to indeterminate mental hospitalization, based solely on incompetency to stand trial, should be held unconstitutional and that any pretrial commitment based on incompetency alone should be restricted only to those persons unlike petitioner for whom there is reasonable assurance that they will become competent within a reasonably short period of time.

II. PETITIONER'S INDETERMINATE CONFINEMENT WITHOUT TRIAL ON THE PENDING CRIMINAL CHARGES VIOLATES HIS CONSTITUTIONAL RIGHTS TO BAIL AND TO A SPEEDY TRIAL

A. Petitioner's Confinement Violates His Right To Bail.

The state has summarily denied bail to petitioner, simply as a consequence of finding him incompetent to stand trial and without any further inquiry regarding the need for pretrial confinement. State laws such as Indiana's that provide for automatic commitment following an incompetency finding implicitly or explicitly forbid pretrial release and "ex-

onerate bail."[7] This result violates the command of the Eighth Amendment that "excessive bail shall not be required . . .", Amdt. VIII, U.S. Constitution. Though the excessive bail clause of the Eighth Amendment has never expressly been held applicable to the states by this Court, there is strong authority for such a holding. See *Pilkinton v. Circuit Court of Howell County, Missouri,* 324 F.2d 45 (8th Cir. 1963): "we take it for granted that . . . the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment," 324 F.2d at 46. See also *Robinson v. State of California,* 370 U.S. 660 (1962); *United States ex rel. Fink v. Heyd,* 287 F. Supp. 716 (E.D. La. 1968); *United States ex rel. Siegal v. Follette,* 290 F. Supp. 632 (S.D.N.Y. 1968); *Jackson v. Bishop,* 268 F. Supp. 804 (E.D. Ark. 1967). The bail right is similarly guaranteed in most state constitutions, including Indiana's.

In considering the application of this constitutional guarantee to criminal defendants, this Court has held, "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Stack v. Boyle,* 342 U.S. 1, 5 (1951).

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[7]See, *e.g.,* Burns Ind. Stat. § 9-1706(a)(2), (3), Code of Ala. § 15-426(5) ("In no event shall such person be set at large so long as such prosecution is pending, or so long as he continues to be insane."), 17 Ariz. Rev. Stat. 15-250(B), Calif. Crim. Proc. Code § 10-1371, Nev. Rev. Stat. § 178.430. The Federal Statute on this subject, 18 U.S.C. § 4247, permits confinement of an incompetent defendant to a federal security hospital only if the court finds that "if released, accused probably will endanger the safety of officers, the property, or other interests of the United States." See, *e.g., Maurietta v. Ciccone,* 305 F. Supp. 775 (W.D. Mo. 1969). A number of states similarly require a finding of "dangerousness" to justify pretrial commitment of an incompetent defendant. See Iowa Code § 783.3, Okla. Stat. § 22-1167, S. Dak. Compiled Laws § 23-38-6, Idaho Code § 19-3304. See also Kansas Stat. § 59-2007, Ore. Rev. Stat. § 426-300(1) permitting forms of parole from commitment notwithstanding the pending criminal charges.

Although a finding of incompetency to stand trial may raise doubts as to whether the meaningful presence of defendant at his trial can be assured, automatic commitment to a state mental institution cannot possibly be considered "relevant to the purpose of assuring the presence of that defendant" at trial, unless it can be shown that such commitment will, with some degree of likelihood, lead to the increased competency of the defendant.

In *Stack v. Boyle*, an unusually high money bail was set. This Court there held:

> "If bail in an amount greater than that usually fixed for [similar] . . . charges of crime is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved." 342 U.S. at 6.

In the instant case, bail was denied outright, an even more effective pretrial restraint than in *Stack*. In the instant case, all of the evidence at the hearing below indicated that denial of bail and commitment to a state mental institution were in no way relevant to assuring petitioner's ultimate presence at trial. All of the witnesses who addressed the question agreed that there was virtually no likelihood that commitment of this mentally defective deaf-mute to state institutions that had no capacity to treat his disabilities would lead to petitioner's ultimate competency to stand trial. On the basis of such a record, petitioner cannot be denied admission to bail. Compare, *United States v. Klein*, 325 F.2d 283 (2d Cir. 1963).

This Court's holding in *Greenwood v. United States*, 350 U.S. 366 (1955), is consistent with this position. *Greenwood* held that an incompetent criminal defendant, indicted for a Federal offense, could be confined in a federal mental institution for treatment. The petition in *Greenwood* argued that his prognosis for recovery was insufficient to justify this confinement. The Court implicitly acknowl-

edged that an unfavorable prognosis could in itself invalidate an incompetency commitment, but it held on the facts of that case that the level of uncertainty regarding the petitioner's prognosis justified his confinement. The Court stated:

> "We cannot say that Federal authority to prosecute has been irretrievably frustrated. The record shows that two court-appointed psychiatrists found petitioner sane and competent for trial. While the District Court did not accept their conclusion, their testimony illustrates the uncertainty of diagnosis in this field and the tentativeness of professional judgment." 350 U.S. at 375.

In the instant case, there is no basis in the record for finding a similar "uncertainty of diagnosis" or "tentativeness of professional judgment" regarding petitioner's present incompetency or his prospects for future competency. The *Greenwood* Court carefully limited its holding on this issue: "We decide no more than the situation before us presents and equally do not imply an opinion on situations not now before us." 350 U.S. at 376. *Greenwood* cannot be stretched to justify petitioner's confinement on the record of this case.

It is admittedly not easy for a court to draw lines between those incompetent defendants whose prognosis is or is not sufficient to justify pretrial detention. But the constitutional right to pretrial freedom is clearly at stake in any such detention. A court must therefore determine that pretrial confinement for an incompetent in a mental hospital is "relevant to the purpose of assuring the presence of that defendant" at a future trial, *Stack v. Boyle, supra.* This judicial determination is necessary to assure that the defendant's constitutional right is to be adequately protected.

It might be argued that, though commitment cannot plausibly lead to petitioner's competency to stand trial, it is justified to protect society against his dangerous proclivi-

ties. But that argument is not tenable. First, it has never been decided by this Court that denial of bail on grounds of "dangerousness" is constitutionally permissible. See, *e.g.*, Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," 56 *U.Va. L. Rev.* 371 (1970). Second, even if denial on such grounds is permissible, there has been no adequate showing of "dangerousness" in this case. As this Court stated in *Stack v. Boyle*, in a related context, "To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act." 342 U.S. at 6. It should be noted that the incompetency commitment upheld by this Court in *Greenwood v. United States, supra*, was based in part on an explicit finding by the trial court that the defendants' release would "probably . . . endanger the safety of officers, the property, or other interests of the United States." 350 U.S. at 372. Third, even the most ardent proponents of the constitutionality of bail denial for "dangerousness" do not suggest that indeterminate commitment with no assurance of ultimate trial on the charges is constitutionally permissible. See Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 *U. Va. L. Rev.* 1223, 1239 (1969); D.C. Code § 23-1322(d)(2)(A) (pretrial detention law setting a 60-day limit on detention and requiring trial as quickly as practicable). Petitioner's commitment could not thus be justified, even accepting the propriety of bail denial for "dangerousness." Because there is so little likelihood of ultimate trial, if petitioner is regarded as so dangerous by reason of his proclivities and his mental state that he cannot be permitted at large, the state is constitutionally required to resort to ordinary civil commitment proceedings.

Compare *Cook v. Ciccone*, 312 F. Supp. 822, 824 (W.D. Mo. 1970):

> "Where an unconvicted person is confined in federal custody under 18 U.S.C. § 4244 or § 4246, and it is clear that his lack of competency to stand trial is permanent . . . such person should be ultimately transferred to the appropriate state authorities for

> adequate control and treatment. In the event that state authorities will not accept the accused, consideration must be given to his outright release from federal custody . . . . Such consideration is dictated by the inherent unfairness and substantial injustice in keeping an unconvicted person in federal custody to await trial where it is plainly evident his mental condition will not permit trial within a reasonable period of time."

See also, *Martin v. Settle,* 192 F. Supp. 156 (W.D. Mo. 1961); *Maurietta v. Ciccone,* 305 F. Supp. 775 (W.D. Mo. 1969); *United States ex rel. von Wolfersdorf v. Johnston,* 317 F. Supp. 66 (S.D. N.Y. 1970): (20-year confinement of incompetent defendant in state hospital for the "criminally insane"; the Court, ordering release, stated, "Nobody has suggested that we ought to weigh seriously the miniscule chance that [relator] will ever become competent before he dies. And yet respondent [the state] perseveres in the argument that relator must stay where he is because he is 'in confinement on a criminal charge . . . .'" 317 F. Supp. at 67).

B. Petitioner's Confinement Violates His Right to a Speedy Trial

Indefinite commitment to a mental institution violates petitioner's "right to a speedy . . . trial." Amdt. VI, U.S. Constitution; *Klopfer v. North Carolina,* 386 U.S. 213 (1967). Many state statutes provide without qualification that prosecution for the indicted offense will resume whenever during his indefinite commitment a defendant becomes competent to stand trial as if no delay had taken place.[8]

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[8]See, *e.g.,* Burns Ind. Stat. § 9-1706a ("upon the release of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity.") 17 Ariz. Rev. Stat. 15-250(B), Mo. Stat. § 545.770, Ohio Rev. Code § 2945.38, R.I. Gen. Laws § 26-4-5, Utah Code § 77-48-5, Wyo. Stat. § 7-241(b). By con-

A number of federal courts have, however, rejected the assumption that the speedy trial right has no relevance to a committed incompetent defendant. See *United States ex rel. von Wolfersdorf v. Johnston,* 317 F.Supp. 66 (S.D. N.Y. 1970); *In re Harmon,* 425 F.2d 916 (1st Cir. 1970) ("[W]e are disturbed by the defendant's lengthy confinement, now approaching a year, without the safeguards of a trial on the offense charged, or formal commitment proceedings addressed to defendant's ability to function in society. Such confinement not only erodes the values protected by the right of a speedy trial, but also seems to be of questionable clinical value. See A. Rosenberg, 'Competency for Trial,' 53 *Judicature* 316, 317 (March 1970)." 425 F.2d at 918); *United States v. Jackson,* 306 F. Supp. 4 (N.D. Calif. 1969) (". . . the prognosis of long-term future incompetence . . . and no federal facility available in which [the accused] can receive medical, not penal treatment . . . leaves this Court with no alternative but to honor the constitutional mandate that a person is guaranteed a speedy trial . . . ." 306 F. Supp. at 6).

The speedy trial right, as applied to incompetent defendants, does not require dismissal of an indictment automatically upon the incompetency finding, any more than the constitutional right to bail requires automatic pretrial release of an incompetent defendant. See part II.A., *supra.* The Court of Appeals for the District of Columbia Circuit has properly framed the issue:

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trast, New York recently enacted a statute providing for dismissal of felony charges against incompetent defendants following compulsory mental hospital commitment for "two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment. . .", N.Y. Criminal Procedure Law § 730.50(3) (1970 Supp.). For all misdemeanor charges, an incompetency finding brings a 90-day commitment "for care and treatment in an appropriate institution" and the court "must dismiss the indictment . . ." *Id.* § 730.50(1). *Compare* Mont. Rev. Code § 95-506(b) (discretionary dismissal of charges following restored competency.)

> "The Supreme Court said in *Beavers v. Haubert,* 1905, 198 U.S. 77, 87 . . . .
>
> > '. . . The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'
>
> "To hold that delay occasioned by the accused's mental incompetence to stand trial always requires dismissal of his indictment would be to ignore the 'rights of public justice.' On the other hand, to resume the prosecution of the accused after long delay may in some circumstances violate his rights beyond the requirement of public justice." *Williams v. United States,* 250 F.2d 19, 21 (D.C. Cir. 1957).

Petitioner in the instant case was charged on May 5 and May 6, 1968 with two crimes alleged to have been committed in July, 1967. On October 23, 1968, an examination of petitioner's competency was ordered. On December 26, 1968, the trial court found petitioner incompetent and commited him to the state Division of Mental Health. Almost three years have elapsed since petitioner's commitment and more than four years have passed since the dates of the alleged crimes. It perhaps cannot conclusively be said that this delay has irrevocably prejudiced petitioner in ultimately defending himself against the criminal charge, if he were ever brought to trial. There is, however, a strong presumption of prejudice from this time passage alone. Moreover, protection against such prejudice is not the only purpose of the speedy trial right. As this court has stated,

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell,* 383 U.S. 116, 120 (1966).

The prejudicial effect of the long delay following petitioner's arrest and commitment on any future trial is not the only wrong that he has suffered from denial of his right to

a speedy trial. Because there was virtually no likelihood at the time of commitment that his hospitalization would lead to his competency to stand trial, petitioner's commitment is "undue and oppressive incarceration." *United States v. Ewell, supra.*

It cannot sensibly be maintained that petitioner's commitment following his incompetency finding was accompanied by his waiver of the speedy trial right. Some courts and commentators have espoused this view of incompetency commitments, *e.g., State v. Violett,* 79 S. Dak. 292, 111 N.W.2d 598 (1961); Note, 20 *Stan. L. Rev.* 476, 480 (1968), but this view is untenable. Precisely because a defendant is found incompetent to stand trial, one cannot attribute to him "knowing and intelligent" waiver of any of his constitutional rights. As this Court stated in a related context:

> "It is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson,* 383 U.S. 375, 384 (1966).

If waiver is to be attributed to an incompetent defendant, it should be only done where pretrial delay is clearly analogous to those delays for which competent defendants are held responsible, such as repeated motions, *e.g., Osborne v. United States,* 371 F.2d 913, 925-26 (6th Cir. 1967), or other delays "welcomed by defendants as . . . [operating] in their favor." *United States ex rel. von Cseh v. Fay,* 313 F.2d 620, 623 (2nd Cir. 1963). Since it is unreasonable to expect an incompetent defendant independently to weigh the merits of delaying his trial, the courts must themselves make that judgment in order to determine whether the delay is attributable to the defendant or is "caused by the deliberate act of the government." *United States v. Provoo,* 17 F.R.D. 183, 201, *aff'd mem.,* 350 U.S. 857 (1955).

In the instant case, there is no plausible way to argue that trial delay would work to petitioner's advantage. Because his incapacities will not likely be remedied during the

delay, and because he will be forced by the state to remain incarcerated until his incapacities are remedied, it is absurd to contend that postponing trial is in any way advantageous to petitioner. Indeed, under the Indiana statute it appears that even if all of the witnesses to the alleged crime died during petitioner's incarceration, he would not have standing to move for dismissal of the charges until he was found "competent to stand trial." Compare, *e.g.*, New York's practice under a similar statutory scheme, as noted by the court in *United States ex rel. von Wolfersdorf v. Johnston*, 317 F. Supp. 66 (S.D.N.Y. 1970); *United States v. Barnes*, 175 F. Supp. 60 (S.D. Calif. 1959); Foote, "A Comment on Pre-Trial Commitment of Criminal Defendants," 108 *U. Pa. L. Rev.* 832, 841 (1960). Accordingly, since petitioner could not—except by the wildest stretch of unreason—want his trial postponed on condition that he remain permanently confined in a mental institution, this postponement cannot be viewed as benefiting or attributable to him. Since the postponement can at most only serve the government's interests by keeping an alleged "dangerous mentally ill person" from society, it must be considered a "deliberate act of the government," a delay which is both "purposeful" and "oppressive," *Pollard v. United States*, 352 U.S. 354, 361 (1957). In the circumstances of this case, the postponement must therefore be judged to violate petitioner's constitutional right to a speedy trial.

In sum, based on the preceding argument, it is evident that, to adapt this Court's previous description of the juvenile court, there are substantial

> "grounds for concern that the [incompetent criminal defendant] receives the worst of both worlds: that he gets neither the protections accorded to [criminal defendants] nor the solicitous care and regenerative treatment postulated for [the civilly committed]." *Kent v. United States*, 383 U.S. 541, 556 (1966).

The right to a speedy trial permits a temporary postponement of trial in order that an incompetent defendant may be treated and rendered competent. But the Constitution

does not permit an indefinite postponement of trial. After a reasonable period of time, if the defendant has not improved sufficiently to be considered competent to stand trial, this delay and this confinement must be ended.

III. STATES HAVE ADEQUATE MEANS TO PROTECT THE RIGHTS OF BOTH THE PUBLIC AND INCOMPETENT DEFENDANTS WITHOUT RELIANCE ON INDETERMINATE CONFINEMENT FOR THOSE FOUND INCOMPETENT TO STAND TRIAL.

As indicated above, the indefinite confinement to a mental hospital of criminal defendants who are found incompetent to stand trial violates the constitutional right to the equal protection of the laws, the right to bail, and the right to a speedy trial. The Constitution permits only a temporary postponement of trial in order that an incompetent defendant may be treated and rendered competent; it does not permit state action indeterminately to postpone trial.

If the defendant has a poor prognosis for a speedy restoration to competence, states have a variety of options which they can utilize to assure fairness to incompetent defendants without sacrificing the public interest. First, the state may apply civil commitment procedures to an incompetent defendant in appropriate cases and dismiss the criminal charges outstanding against him. Second, the state may allow the defendant, through his attorney, to make any motions which are capable of fair determination without the defendant's personal participation. It is in both the defendant's and the state's interests to resolve such matters. Third, the state may criminally try an incompetent defendant, if it can give sufficient assurances that a fundamentally fair trial is possible notwithstanding the defendant's disability. In this regard, mental incompetence should be viewed as similar to other disabilities, such as amnesia, other forms of memory loss, or other physical disabilities which may affect a defendant's ability to fully exercise his constitutional rights at trial, but which have not been held to be an absolute bar to trial.

A. States May Apply Civil Commitment Procedures to Incompetent Criminal Defendants in Appropriate Cases If Outstanding Criminal Charges Are Dismissed.

One of the options open to a state in dealing with an incompetent criminal defendant whose prognosis for recovery within a reasonably short time is poor, is to resort to civil commitment procedures. Once the state makes the determination, however, that it wishes to commit indefinitely—that is, to commit civilly—the incompetent defendant, it must dismiss the criminal charges against him.

The purpose of the criminal process must be to move toward the resolution of criminal charges. Thus, trial must be the objective being sought at all times. When there are unreasonable delays in this process, or when the purpose of the criminal process as it is applied to a particular person charged with crime no longer is to bring that person to trial, the process is abused. Under such circumstances, it has long been held an inherent power of the courts to dismiss the charges against a defendant. See, *e.g., United States v. Kovacs,* 150 F. Supp. 301 (E.D.N.Y. 1957); *United States v. Apex Distributing Company,* 270 F.2d 747 (9th Cir. 1959); *United States v. Dallego,* 311 F. Supp. 227 (E.D. N.Y. 1970); Federal Rules of Criminal Procedure, Rule 48(b), 18 U.S.C.A. As one court described this situation:

> "We can conceive the anarchy which would result if the power to terminate a criminal proceeding for want of prosecution did not exist. Defendants might have prosecutions hang over their heads, like the sword of Damocles, for years, without an effort being made to bring him to trial. And yet, if the prosecutor should refuse to try them, and the court acquiesce, they would be at his mercy." *Ex parte Altman,* 34 F. Supp. 106, 108 (S.D. Calif. 1940).

It is evident that the notion of fundamental fairness to a defendant, which is inherent in the concept of due process,

must take this situation into account. When efforts are no longer being made to bring a defendant to trial, the charges against him must be dropped, and incarceration based upon those charges must be ended. When a criminal defendant is civilly committed to a mental institution after a finding that he is not likely to be restored to competence in a reasonable time, efforts are no longer being made to bring him to trial. Consequently, to allow criminal charges to remain outstanding against such a person, to allow this "sword of Damocles" to hang over his head, would be manifestly unjust. When a person is civilly committed, criminal charges against him should be dismissed.

It may be that, as a matter of constitutional doctrine, an identical result—dismissal of criminal charges—is compelled in the instant case. The petitioner is not expected ever to "recover" in such a way as to allow criminal proceedings to proceed; hence, in practical terms, efforts are no longer being made to bring him to trial. A court ruling that required dismissal of the charges against petitioner would be eminently reasonable. To permit the criminal charge to remain outstanding for petitioner's lifetime with no effort ever being made to bring him to trial would work a disproportionate and oppressive injustice whether or not he remained in state custody because of the charge. (Nothing in the record suggests that petitioner could be civilly committed under Indiana law (see pp. 6-9, *supra*) or that institutionalization is appropriate for petitioner. *Amici* submit that incompetent defendants who can function in the community, cannot be treated, and do not pose a threat to the community, should not in any case be deprived of their liberty.)

B. An Incompetent Defendant May Make Any Motion Susceptible of Fair Determination Without His Personal Participation.

Even though a defendant may not be competent to be criminally tried, it is clear that many motions which could be dispositive of the charges against him do not require his assistance. Motions regarding such matters as the suppres-

sion of illegally seized evidence, the exclusion of illegally obtained statements and confessions, or the dismissal of charges based on the lapse of the statute of limitations governing the alleged offense are examples. Notwithstanding his incompetency, his attorney must be allowed to make such motions. See *Neely v. Hogan,* 310 N.Y.S.2d 86 (1970), (a state statute providing for the suspension of criminal proceedings against an incompetent defendant does not suspend the defendant's right to make motions addressed to the dismissal of the indictment, but only suspends the right of the state further to prosecute the defendant.)

With regard to such motions, the personal participation of the defendant is not necessary, and to bar his attorney from making these motions could create the substantial injustice of preventing the dismissal of the charges which led to the defendant's confinement in the first place. See Wisc. Stat. § 957.13 (5) ("The fact that the defendant is unfit to proceed does not prevent the making and determination . . . of any legal objection which is susceptible of fair determination before trial without the personal participation of the defendant."); Rev. Codes of Mont. § 95-506 (c) (1957); Annotated Code of Maryland Art. 59, § 24(a) (1970 Supp.); N.Y. Criminal Procedure Laws § 730.60(5) (1971).

C. States May, in Some Circumstances, with the Assurance of Fundamental Fairness to the Defendant, Criminally Try an Incompetent Defendant.

Though dictum in *Pate v. Robinson,* 373 U.S. 375, Part III.A., *supra,* appears to foreclose any possibility of trial for one found incompetent, the specific holding in that case does not compel this result. *Pate* held that where the record showed some doubt of a criminal defendant's competency, the state must conduct a hearing to determine competency before it could proceed with the trial. It is implicit in this holding that, if a defendant is found incompetent at such hearing, the state cannot then simply ignore this finding and immediately proceed to trial. But *Pate* does not

necessarily hold that, following an incompetency finding, the state is barred from proceeding to trial at all times in all conceivable circumstances. A court might conclude that a fundamentally fair trial of an incompetent defendant was possible by resort to special trial procedures. For example, a court might require a higher standard of proof—proof which negated all reasonable hypotheses of innocence; or require independent corroboration of all incriminating evidence including the testimony of eyewitnesses; or require full discovery in advance of trial of the prosecution's case. *Cf. Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968), discussed in Part III.D.1, *infra*. In general, the burden of establishing the fairness of the procedure would be on the prosecution. *Pate* does not necessarily foreclose the possibility of trial under such circumstances. *Pate* requires that the state not ignore a defendant's incompetency, and that the possibility be recognized that his mental state will render any trial constitutionally unfair. But a particularized, adequately supported judgment that a fair trial is possible notwithstanding a defendant's incompetency could satisfy the mandate of *Pate*.

The Supreme Court of Illinois has recently decided a case directly analogous to the instant case. In *People ex rel. Myers v. Briggs*, 46 Ill. 2d 281, 263 N.E. 2d 109 (1970), the defendant was an illiterate deaf-mute who was found incompetent to stand trial and committed to the state Department of Mental Health. 263 N.E. 2d at 110. The superintendent of the commitment institution concluded that the defendant apparently "will never acquire the necessary communication skills needed to participate and cooperate in his trial." 263 N.E. 2d at 111. The Illinois Supreme Court ruled as follows:

> "This court is of the opinion that this defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him, should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released." 263 N.E. 2d at 113.

In reaching this conclusion, the Illinois court's reasoning is instructive:

> "The general rule in handling the trial of a criminal defendant who is handicapped by deafness, blindness or other affliction is that a trial judge should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit . . . . The fact of blindness or deafness of the accused may lessen the ability and capacity of the defendant to utilize his constitutional rights, but this will not prevent his being subject to trial. In the proper administration of justice, however, the court should give a person accused of crime a reasonable opportunity to obtain the benefit of his constitutional rights. If he is deaf, such opportunity as may be necessary should be allowed for communication to him of the testimony of the witnesses to insure him a full and fair exercise of his legal rights." 263 N.E. 2d at 113.

D. Mental Incompetency, Like Other Disabilities Which Impair a Defendant's Ability To Defend Himself, Should Not Be Considered an Absolute Bar to Trial.

This Court should view mental incompetency like other disabilities which, although they substantially impair a criminal defendant's ability to defend himself, are not considered absolute bars to trial. Examples of such disabilities are memory loss of the events at the time of the alleged crime (whether from amnesia or from simple passage of time), unavailability of important witnesses, or physical incapacity. For these disabilities (many of which impinge upon important constitutional rights), courts have evolved working rules to give wide latitude to criminal defendants in order to become more "competent to stand trial." But when these disabilities cannot be overcome within a reasonable time, courts have generally held that the public interest in conducting a criminal trial should prevail. At such trial, in many instances, special procedures have been adopted to mitigate the deleterious consequences to the defendant of the continuing disability. But trials of such "disabled de-

fendants" have taken place, and have been held to meet constitutional requirements of fairness.

1. *Trial Incompetency from Defendant's Memory Loss by Amnesia.*

A defendant's diminished capacity to stand trial because he has amnesia of the events surrounding the alleged crime works the same disability on a defendant whether or not that amnesia is clearly linked to a diagnosed mental illness.[9] The Court of Appeals for the District of Columbia Circuit has recently recognized the anomaly in this treatment of the non-mentally ill amnesic defendant. In *Wilson v. United States,* 391 F.2d 460, 463 (1968), the Court acknowledged that amnesia, whether or not the accused suffers from a defined "mental illness," can raise the constitutional issue of competency to stand trial. But the court further held that the presence of amnesia was not necessarily a bar to trial. Rather, the Court stated "the probability of prejudice, not lack of memory per se, [is] controlling" 391 F.2d at 464 n. 4.

In order to limit the possibility of prejudice from the defendant's amnesia, the Court required that the trial court pay close attention, and make specific findings of fact at the conclusion of the trial, regarding the possibility that the

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[9]See Note, "Amnesia: A Case Study in the Limits of Particular Justice," 71 *Yale L.J.* 109, 116 (1961):

> ". . . there is no record of any court holding a defendant incompetent to stand trial solely on the basis of amnesia . . .. [This] rule produces anomalous results for while the policy underlying the doctrine of competency focuses on the impairment of the rational ability of the accused to conduct his defense, the rule presently applied by the courts is conditioned upon the fortuitous presence of a narrowly defined mental disorder. Thus, a schizophrenic may have extraordinary recall and appear perfectly rational yet be spared trial because of the rather speculative effect of his possibly impaired orientation or perspective, while the amnesic defendant is forced to stand trial under obvious disabilities."

defendant's amnesic condition deprived him of a fair trial in the particular circumstances of that trial. In particular, because of the defendant's incompetency, the Court required that the government satisfy a quite extraordinary burden of proof at trial—"such as to negate all reasonable hypotheses of innocence." 391 F.2d at 464, 465.

In *Wilson,* as in the instant case, expert testimony established that the accused "almost certainly never will" recover from the disability which impaired his competency to stand trial. 391 F.2d at 462. Thus the *Wilson* court faced the same problem as is presented by the instant case: whether to incarcerate the accused for life without trial (though ostensibly under statutory authority to hospitalize him until he becomes competent), whether to require dismissal of the charges, or whether to attempt to bring the accused to trial while protecting him from the deleterious consequences of his incapacities. The *Wilson* court's resolution of this problem should commend itself to this Court. In applying the traditional doctrines of mental incompetency to stand trial, courts have not engaged in the kind of particularized inquiry that the *Wilson* court suggests. But insistence on drawing closer causal links between a defendant's incompetency—where competency is not likely to quickly be restored—and the ways in which that incompetency will prejudice him at trial will protect the defendant's constitutional right to a fair trial and his constitutional right to speedy disposition of the charges against him.

It should be noted that the *Wilson* court did not order that a trial be held but rather that the court below assure itself that a fair trial could be conducted notwithstanding the defendant's incompetency. As the Court stated, "if . . . the Government is unable to overcome the unfairness . . . the indictment will be dismissed." 391 F.2d at 464. A similar disposition should govern the instant case. Compare, *Reagon v. State of Indiana,* __ Ind. __, 251 N.E. 2d 829 (1969).

2. *Trial Incompetency by Defendant's Memory Loss from Extensive Passage of Time.*

Passage of time between the date of an alleged crime and the trial date can also drastically reduce an accused's capacity to defend himself. Our law traditionally has protected defendants against this incapacity in two ways, by statutes of limitations and by the constitutional right to a speedy trial. The constitutional right has, however, customarily only been applied to the time following arrest or indictment. See Note, "The Right to a Speedy Trial," 20 *Stan. L. Rev.* 476, 485 (1968). In a recent series of cases, the District of Columbia Court of Appeals has addressed the problem of defendants' memory disabilities flowing from purposeful government delay between the alleged commission of the crime—narcotics sales—and indictment. In those cases, the delay was justified by the government on the ground that its undercover agents must remain anonymous for long periods of time to retain their usefulness, and accordingly these agents can publicly divulge their incriminating information in a criminal indictment only at the conclusion of their undercover service. The District of Columbia Circuit Court acknowledged that such delay could seriously incapacitate a defendant, but it refused to rely on this "trial incompetency" as an absolute bar to prosecution. Rather, as in *Wilson, supra,* the Court required the defendant to make a particularized showing of prejudice, to establish that the disability imposed by the delay in fact worked to his prejudice given the specific charges and the defendant's specific needs. See, *e.g., Woody v. United States,* 370 F.2d 214 (D.C. Cir. 1966); *Worthy v. United States,* 352 F.2d 718 (D.C. Cir. 1965), *vacated on other grounds,* 384 U.S. 894 (1966); *Cannady v. United States,* 351 F.2d 817 (D.C. Cir. 1965); *Ross v. United States,* 349 F.2d 210 (D.C. Cir. 1965). In particular, as in *Wilson, supra,* the strength of the Government's case, including whether the complaining witness' testimony was independently corroborated, was

considered a central determinant of the fairness of convicting an accused notwithstanding the "trial incompetency" worked by the delay in his arrest and indictment. See *Ross v. United States, supra; Morrison v. United States,* 365 F.2d 521 (D.C. Cir. 1965); *Bey v. United States,* 350 F.2d 467 (D.C. Cir. 1965), *cert. denied,* 385 U.S. 905 (1966).

Though the analogy between these "narcotics delay" cases and the instant case is not precise, it nonetheless strongly suggests the legitimacy of accommodating criminal defendants' interests in having the highest degree of "trial competency" with the government's legitimate interest in bringing a "less than fully competent" defendant to trial for alleged criminal conduct.

3. *Trial Incompetency from Unavailability of Witnesses.*

A criminal defendant has a constitutional right "to have compulsory process for obtaining witnesses in his favor." Amdt. VI, U.S. Constitution. The inability of a defendant to produce a known key witness in his favor can as clearly and completely undermine his capacity to make his defense as petitioner's disabilities in the instant case. Yet the mere assertion by a defendant that he wants a trial continuance to exercise his right to locate favorable witnesses is not sufficient for an automatic trial postponement. Rather, as the Court of Appeals for the Tenth Circuit has held,

> "When a continuance is sought to obtain witnesses, the accused must show who they are, what their testimony will be, that the testimony will be competent and relevant, that the witnesses can probably be obtained if the continuance is granted, and that due diligence has been used to obtain their attendance on the day set for trial." *Leino v. United States,* 338 F.2d 154, 156 (1964).

See also, Wright, *Federal Practice and Procedure,* §832 at p. 338 (Continuances) (1969).

This generally prevailing rule suggests that though a defendant has a constitutional right to be "free from trial incapacity" resulting from absent witnesses, the prejudice from that incapacity must be shown with considerable particularity. Moreover, though every reasonable effort must first be made to remedy the defendant's incapacity, at some point the government's interest in conducting a criminal trial must take precedence. Once again, though the analogy of this rule to the instant case is not precise, it is strongly suggestive.

4. *Trial Incompetency from Defendant's Physical Disabilities.*

In *United States v. Knohl,* 379 F.2d 427 (2d Cir. 1967), the court acknowledged that physical disability can be a proper ground for finding a defendant incompetent for trial, stating that "it will usually be the better course, where there is reasonable ground to believe that physical disability may prevent a proper defense or endanger the life of a defendant, for the trial court to hold an evidentiary hearing as close to trial as practical." 379 F.2d at 437. But the court clearly implied that such physical disability need not be an absolute bar to trial where adequate techniques for protecting the reasonable interests of the defendant are available. The court stated,

> "The judge's own observation of the accused and the opportunity to adjust the trial itself to needs of one suffering physical disability by shortening court sessions, affording the accused periods of rest and having present such medical and nursing aids and attendants as may be needed, give particular cogency to the trial court's estimate of the circumstances and to its disposition of the matter." 379 F.2d at 437. See also, Wright, *Federal Practice and Procedure,* § 832 (Continuances) (1969).

Once again, though the analogy is not precise, this practice suggests the propriety of adopting a similar approach for the instant case.

5. *Trial Incompetency from Defendant's Disruptive Behavior.*

This Court recently permitted a substantial modification of constitutionally mandated criminal trial procedures to respond to special trial difficulties presented by a criminal defendant. In *Illinois v. Allen,* 397 U.S. 337 (1970), this Court ruled that, notwithstanding the Sixth Amendment's confrontation guarantee, an unruly defendant could be tried while physically absent from the courtroom It might be argued that *Allen* permitted an *in absentia* trial because the defendant willfully misbehaved. But this Court in *Allen* approved the court's action removing defendant, which might in itself have contributed to the likelihood that the defendant would be convicted of an offense which resulted in a prison term of ten to thirty years. Unless the Court was satisfied that, in the circumstances of that case, it was fair to try Allen outside his presence, infliction of such a deprivation simply as a punishment for his trial misconduct seems vastly disproportionate.

It should also be noted that there was a suggestion in the record that Allen himself "was a sick person . . . who may or may not have been insane in the classical sense but who apparently had a diseased mind." 397 U.S. at 356-57 (Mr. Justice Brennan, concurring). Immediately following his indictment on the charges for which he was ultimately convicted, Allen had been found incompetent to stand trial; a year later he was found competent and trial followed, accompanied by the disruptive behavior noted. 397 U.S. at 357 n. 5 (Mr. Justice Brennan, concurring). (On the significance of disruptive behavior at trial as suggesting incompetency, see *Pouncey v. United States,* 349 F.2d 699 (D.C. Cir. 1965)). *Allen* may thus be seen as this Court's approval of special rules to conduct a fair trial of a possibly incompetent defendant. Moreover, as this Court made clear in *Allen,* a trial court "must indulge every reasonable presumption," 397 U.S. at 343, until it becomes clear that trial is impossible without special procedures.

When dealing with incompetent defendants generally, trial courts must similarly explore every possibility that a defendant can be made fully competent to stand trial within a reasonably short period of time. But where, as in the instant case, it is evident that no reasonable treatment possibilities are available to make the defendant competent, the state cannot postpone definitive resolution of the outstanding criminal charges.

Some jurisdictions have permitted an incompetent defendant to go to trial in order to establish his innocence, but refused to permit conviction. Under this approach, if a defendant fails to establish his innocence, the criminal charge is held in abeyance and the defendant is committed to a mental hospital until he becomes fully competent to stand trial. See West's Wisc. Stat. Ann. § 957.13(5); N.Y. Criminal Procedure Laws § 730.60(4)(1971); West's Mass. Gen. Laws Ann. C.123, § 17 (1971 Supp.); [English] Criminal Procedure (Insanity) Act 1964 (c. 84) §4; *R. v. Roberts*, (1953), 2 All Eng. Rep. 340 (Devlin, J.).

It is submitted, however, that this more limited approach is not necessary. If a defendant who is unlikely to be made competent in a reasonable time, is brought to trial following a judicial determination that in the particular circumstances of the case it is fair that he be tried, and if the defendant's innocence is not established, it serves no one's interest—neither the defendant's nor the state's—to hold the criminal charge in abeyance until the defendant becomes competent. For such defendant this resolution would mean that a criminal charge would hang over him indefinitely. From the state's perspective, it would be best to have definitive resolution of the criminal charge against the defendant in a single proceeding at which it was determined, first, whether the criminal charge could proceed to trial or must be dismissed, and, second, if trial were possible, whether the defendant was guilty or innocent.

The basic premise of this argument is that mental incompetency, like other incompetencies that may touch impor-

tant constitutional rights, need not be an absolute bar to trial, but that there can be circumstances in which an incompetent defendant can be fairly tried and convicted as well as tried and acquitted. Special trial procedures, in addition to special burdens of proof on the government, may well be necessary to assure a fair proceeding. But by employing such special procedures and substantive rules, it is submitted that the constitutional norm of fairness can be satisfied. In view of the substantiality of the constitutional right at stake, see *Pate v. Robinson, supra,* the state should be required to discharge a heavy burden of proof before it can establish that a fair trial is possible notwithstanding a defendant's incompetency.

This Court should not, however, absolutely foreclose the state from bringing an incompetent defendant to trial if it can be shown that a fair trial is possible notwithstanding the particular disabilities which afflict the defendant. If such a fair trial is not possible, the state is then compelled to dismiss the criminal charges. It is clear, however, that the state is not compelled to bring any incompetent defendant to trial, whether or not a fair trial can be conducted. The state can instead choose to dismiss the indictment (as New York has chosen with regard to all misdemeanor charges against defendants found incompetent, see N.Y. Criminal Procedure Law § 730.50(1) (1970)). Following dismissal of the indictment for any of the foregoing reasons, the state may choose to invoke civil commitment proceedings in which its interests in public protection can be vindicated.

CONCLUSION

The Court should permit the state to have a wide range of options, consistent with principles of fundamental fairness, in dealing with incompetent criminal defendants, such as petitioner, whose incompetency does not appear remediable within a reasonably short period of time. This Court must conclusively withdraw only one option from the state: the option to keep such defendant indefinitely incarcerated

in a limbo status, without opportunity for definitive resolution of the criminal charge hanging over him. Such status is not necessary to protect any legitimate public interest, and it infringes drastically upon the incompetent defendant's rights.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JACKSON *v.* INDIANA

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 70–5009. Argued November 18, 1971—Decided June 7, 1972

The Indiana procedure for pretrial commitment of incompetent criminal defendants set forth in Ind. Ann. Stat. § 9–1706a provides that a trial judge with "reasonable ground" to believe the defendant to be incompetent to stand trial must appoint two examining physicians and schedule a competency hearing, at which the defendant may introduce evidence. If the court, on the basis of the physicians' report and "other evidence," finds that the defendant lacks "comprehension sufficient to understand the proceedings and make his defense," the trial is delayed and the defendant is remanded to the state department of mental health for commitment to an "appropriate psychiatric institution" until defendant shall become "sane." Other statutory provisions apply to commitment of citizens who are "feeble-minded, and are therefore unable properly to care for themselves." The procedures for committing such persons are substantially similar to those for determining a criminal defendant's pretrial competency, but a person committed as "feeble-minded" may be released "at any time" his condition warrants it in the judgment of the superintendent of the institution. Indiana also has a comprehensive commitment scheme for the "mentally ill," *i. e.*, those with a "psychiatric disorder" as defined by the statute, who can be committed on a showing of mental illness and need for "care, treatment, training or detention." A person so committed may be released when the superintendent of the institution shall discharge him, or when he is cured.

Petitioner in this case, a mentally defective deaf mute, who cannot read, write, or virtually otherwise communicate, was charged with two criminal offenses and committed under the § 9–1706a procedure. The doctors' report showed that petitioner's condition precluded his understanding the nature of the charges against him or

Syllabus

participating in his defense and their testimony showed that the prognosis was "rather dim"; that even if petitioner were not a deaf mute he would be incompetent to stand trial; and that petitioner's intelligence was not sufficient to enable him ever to develop the necessary communication skills. According to a deaf-school interpreter's testimony, the State had no facilities that could help petitioner learn minimal communication skills. After finding that petitioner "lack[ed] comprehension sufficient to make his defense," the court ordered petitioner committed until such time as the health department could certify petitioner's sanity to the court. Petitioner's counsel filed a motion for a new trial, which was denied. The State Supreme Court affirmed. Contending that his commitment was tantamount to a "life sentence" without his having been convicted of a crime, petitioner claims that commitment under § 9–1706a deprived him of equal protection because, absent the criminal charges against him, the State would have had to proceed under the other statutory procedures for the feeble-minded or those for the mentally ill, under either of which petitioner would have been entitled to substantially greater rights. Petitioner also asserts that indefinite commitment under the section deprived him of due process and subjected him to cruel and unusual punishment. *Held:*

1. By subjecting petitioner to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all other persons not charged with offenses, thus condemning petitioner to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by ordinary civil commitment procedures, Indiana deprived petitioner of equal protection. Cf. *Baxstrom* v. *Herold*, 383 U. S. 107. Pp. 7–14.

2. Indiana's indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violates due process. Such a defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future. If it is determined that he will not, the State must either institute civil proceedings applicable to indefinite commitment of those not charged with crime, or release the defendant. *Greenwood* v. *United States*, 350 U. S. 366, distinguished. Pp. 15–23.

3. Since the issue of petitioner's criminal responsibility at the time of the alleged offenses (as distinguished from the issue of his

competency to stand trial) has not been determined and other matters of defense may remain to be resolved, it would be premature for this Court to dismiss the charges against petitioner. Pp. 23–25.

— Ind. —, 255 N. E. 2d 515, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70–5009

Theon Jackson, Petitioner,
v.
State of Indiana.

On Writ of Certiorari to the Supreme Court of Indiana.

[June 7, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

We are here concerned with the constitutionality of certain aspects of Indiana's system for pretrial commitment of one accused of crime.

Petitioner, Theon Jackson, is a mentally defective deaf mute with a mental level of a pre-school child. He cannot read, write, or otherwise communicate except through limited sign language. In May 1968, at age 27, he was charged in the Criminal Court of Marion County, Indiana, with separate robberies of two women. The offenses were alleged to have occurred the preceding July. The first involved property (a purse and its contents) of the value of four dollars. The second concerned five dollars in money. The record sheds no light on these charges since, upon receipt of not guilty pleas from Jackson, the trial court set in motion the Indiana procedures for determining his competency to stand trial. Ind. Ann. Stat. § 9–1706a (Supp. 1971),[1] now Ind. Code 35–5–3–2 (1971).

[1] "9–1706a. Commitment before trial—Subsequent actions.—When at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time